QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

April 1, 1949

Through June 30, 1949

Volume No. 55

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1949, through June 30, 1949.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL

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OPINIONS

April 1, 1949.

Honorable Asa Rountree, Jr.,
State Director of Aeronautics,
Department of Aeronautics,
CAPITOL.

Airports—Licenses.

Personal airport used by others than individual owner should be licensed by the Alabama Aeronautic Commission in accordance with Act No. 402, General Acts of Alabama 1945, page 620.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of March 25, 1949, is as follows:

"The Alabama Aeronautics Commission has the responsibility of licensing airports. Subdivision 12 of Section 5 of the Alabama Aeronautics Act of 1945 excepts from licensing personal airfields on private property used by the individual and his immediate family.

"Your official opinion is respectfully requested on the following question: Should the Commission set minimum standards and require licenses for these airfields when they are used by others than the 'individual and his immediate family.'"

In my opinion, your inquiry should be answered in the affirmative.

Section 5, subdivision 5, of the Alabama Aeronautics Department Act of 1945, Act No. 402, General Acts of Alabama 1945, page 620, makes it unlawful for any person to operate an airport, restricted landing area, or other air navigation facility for which a license has not been issued by the Commission and unless such license is in full effect.

Excepted from this provision are "restricted landing areas, on private property, designated for the use of an individual and his immediate family." Section 5, subdivision 12, Alabama Aeronautics Department Act, supra.

It is my opinion that if the owner of a personal airfield permits others to use it, either by express or implied invitation, he no longer comes within the exception mentioned above, and the Commission should set minimum standard and require a license for this type of field.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 4, 1949.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Licenses—Chain Stores.

Two retail ladies' ready-to-wear stores, partially owned by a common partner, who shares in the profits of the stores, are under a common ownership, supervision, or management, of a single person, are a chain of stores and are liable for a chain-store license.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of March 22, 1949, is as follows:

"Re: License Tax—Stores—Under the Provisions of Article 3, Chapter 20, Title 51, 1940 **Code of Alabama, as amended.**

"As Probate Judge of Etowah County, Alabama, I am writing to request your opinion as to whether, under the following facts and circumstances, a license, as prescribed by Sub-section (b), Section 624, Title 51, 1940 Code of Alabama, as amended, should be collected.

"The facts and circumstances may be stated as follows:

"A and his wife, B, are partners, operating a store in the western part of the City of Gadsden (Alabama City) under the name of A. This store is under the management of said husband and wife, A and B, and they do all of the buying for said store. The store is a retail establishment, selling ladies' ready-to-wear. All required licenses, except, of course, the license inquired about, have been taken out by A and B, as partners in the operation of said store.

"A and C are partners in the operation of a store located in downtown Gadsden, under the name of A's Town Shop, selling, at retail, ladies' ready-to-wear. This store is under the management of C's wife and she does all the buying for it. A's only connection with the store referred to in this paragraph, which is operated under the name of A's Town Shop, is that he is a partner in the business and shares therein as such. A and C have also taken out all required licenses, except the license inquired about.

"It can be further stated that C and C's wife have no interest whatsoever in the store operated by A and B and there is no direct or indirect agreement or understanding that the revenues, net or gross, or profits, from either of the stores shall be made available, immediately or ultimately, to the benefit of the other. Each of said stores maintains its own records, bank accounts, etc., and the only relation between them, if it may be termed a relation, is the fact that A is a partner in both of the businesses—in one instance, with his wife B, and in the other, with C."

I do not have the partnership agreements before me, but as you state in your facts that A is a partner in both ladies' ready-to-wear stores, I am assuming that he shares in the profits of the stores. It, therefore, follows that the two retail ladies' ready-to-wear stores are under a common ownership, supervision or management of a single person, are a chain of stores and are liable for the annual license fee as prescribed under Title 51, Section 624, Code of Alabama 1940, as amended by Act No. 430, General Acts 1945, page 675, approved July 6, 1945.

Title 51, Sections 624 and 627, Code of Alabama 1940, as amended by Act No. 430, General Acts 1945, page 675, approved July 6, 1945, provide, in part, as follows:

"Section 624—Every person, firm, corporation, association, or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 621 and 623 of this Title and shall be in addition to all other license or privilege taxes levied by this Section or hereafter levied. The license fees as herein prescribed shall be as follows: (a) Upon one store, the annual license fee shall be one dollar for each store. (b) Upon two stores or more but not to exceed five stores, the annual license fee shall be fifteen dollars for each additional store. * * *"

"Section 627—* * * Two or more stores or mercantile establishments shall, for the purpose of this Article, be treated as being under a single or common ownership, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such stores or mercantile establishments, or if any part of the gross revenues, net revenues, or profits from any such stores or mercantile establishments shall directly or indirectly be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, of any single

person or any group of persons having a common interest therein. * * *."

See opinion of this office rendered to Hon. William W. Hill, Judge of Probate, Montgomery County, under date of March 15, 1949, a copy of which is enclosed for your convenience, which holds that three stores or mercantile establishments under a common ownership, supervision, or management, of a single person or any group of persons as defined in Title 51, Section 627, Code of Alabama 1940, are a chain of stores and are liable for the annual license fee as specified in Title 51, Section 624, Code of Alabama 1940.

The premises considered, it is my opinion that the two retail ladies' ready-to-wear stores are a chain of stores and are liable for the chain store license as prescribed under Section 624(a) and (b), supra. You should collect a license of sixteen dollars from the chain of stores.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 4, 1949

Mrs. C. F. Hart,
Tax Assessor,
Covington County,
Andalusia, Alabama.

Taxation—Exemptions.

Title 51, Sections 2, 41, 45, 46 and 55, Code of Alabama 1940.

1. A hospital qualifying for exemption from ad varolem taxation under the provisions of Title 51, Section 2, Code of Alabama 1940 ,as amended, is entitled to have such exemption deducted from the fair and reasonable market value of the property of such hospital subject to ad valorem taxation rather than from the assessed valuation of such property.

2. A taxpayer who is a deaf mute may claim the exemption from ad valorem taxation provided by Title 51, Section 2, Code of Alabama 1940, as amended, and may list and claim an automobile owned by him as an item of property subject to such exemption.

Opinion by Assistant Attorney General Hardin.

Dear Madam:

Your request for an official opinion, bearing date of January 27, 1949, is as follows:

"When a hospital that is incorporated asks for an exemption, does the $20,000. that they are allowed mean $20,000., 100 per cent value, or would that mean $12,000. taxable value?

"Is a person who is deaf and dumb entitled to an exemption of tax on an automobile?"

Each of your inquiries relate to exemptions authorized under the provisions of Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, page 491. The first of these pertinent to your inquiry is that listed as Subsection b-(1) thereof, and is as follows:

"All property, real or personal used exclusively for hospital purposes, to the amount of twenty thousand dollars, where such hospitals maintain wards for charity patients, or give treatment to such patients, provided that the treatment of charity patients constitutes at least fifteen percent of the business of such hospitals, provided further that such hospital need not be assessed for taxation if the owner or manager shall file with the county tax assessor wherein such hospital is located within the time allowed for assessing such property for taxation a certificate that such hospital has done fifteen percent charity work in the preceding tax year; and further provided that such hospital through its owner or manager shall have until the expiration of the preceding tax year to class its work and ascertain whether or not such hospital has done fifteen percent of its treatment of patients as charity work."

In my judgment, the above-quoted subsection exempts from ad valorem taxation the property, both real and personal, of those hospitals or other institutions qualifying thereunder in the amount of $20,000, said figure representing the fair and reasonable market value of such property and not the assessed valuation thereof, the latter figure being as you know, sixty percent of the fair and reasonable market value of such property.

I base the above conclusion upon the pertinent provisions of Title 51, Section 55, Code of Alabama 1940, which are to the effect that:

"The assessor shall, from information entered on the tax return list and from all other information known to him, or which he may procure, proceed to ascertain what, in his best judgment, is a fair and reasonable market value of each item of property returned by or listed to any taxpayer; * * * and the assessor shall in separate columns, enter on such list such amount and value and deduction for exemption to which such taxpayer is entitled; * * *"

The provisions of Title 51, Section 41, 45 and 46 are to like effect in that such statutes provide that in listing property for assessment and

claiming exemptions thereon, there should first be ascertained the fair and reasonable market value of such property.

From the above, it would appear that in preparing the assessment return of the taxpayer, the assessor first ascertains the fair and reasonable market value of the property listed for assessment, deducts therefrom the amount of any exemption to which the taxpayer might be entitled, and from the figure thus ascertained computes the assessed valuation of the remaining property, i.e., the sixty percent valuation thereof as provided for by Title 51, Section 17, Code of Alabama 1940.

For example, should there be a hospital possessed of property, real and personal, of the value of $40,000 desiring to assess such property for purposes of ad valorem taxation and to claim the exemption granted by Title 51, Section 2, Subsection b-(1), as amended, supra, it is my judgment, that if such hospital is otherwise qualified for such exemption, the assessor in making such assessment should first ascertain the fair and reasonable market value of all the property of the hospital, which we shall assume to be $40,000, and then deduct therefrom the statutory exemption of $20,000, leaving a remainder of $20,000 upon which ad valorem tax is due. The assessor should then proceed to ascertain the assessed valuation of this latter amount, which, in this case, would be $12,000, and set down such figure as the assessed valuation of the property of the hospital subject to taxation.

In reply to your second inquiry, I would advise that it is my opinion that a taxpayer satisfactorily proving to the assessor that he is a deaf mute is entitled to an exemption from ad valorem taxation upon his automobile provided such item of property be specifically claimed and listed as one of those items of property such taxpayer wishes to claim as exempt under the exemption provided for by Title 51, Section 2, Subsection (f), Code of Alabama 1940, as amended, supra. This provision is as follows:

> "The following property and persons shall be exempt from ad valorem taxation and none other: * * * (f) The property of deaf mutes, insane or blind persons to the extent of three thousand dollars."

The distinction between the levying and collection of ad valorem taxation upon an automobile and any other item of real or personal property is that the former is levied and collected at a different time, as provided by Title 51, Section 704, Code of Alabama 1940, that is, when application is made for license to operate such motor vehicle upon the highways of the State. However, such tax is in every sense an ad valorem tax and is so defined by the statute, and I know of no resaon why one entitled to a certain exemption from ad valorem taxation might not be able to claim such exemption upon this item of property, provided it be listed with the tax assessor and entered upon his tax

return as an item of property upon which exemption is claimed. Title 51, Section 41, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 5, 1949.

Hon. C. C. (Jack) Owen,
Associate Commissioner,
Alabama Public Service Commission,
CAPITOL.

Motor Vehicles—Licenses—Taxation—Title 51, Section 695, Code of Alabama 1940.

1. Owner of motor vehicle holding license and tag for transporting passengers for hire over a described route may operate said vehicle for his own private use.

2. Whether or not a motor vehicle is being used for private or public use is a matter of factual determination.

3. Quarterly Report of Attorney General, Vol. 47, page 108, overruled in part.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1948, is as follows:

"I respectfully request your opinion in the following situation.

"A taxi operator in the State of Alabama who owns only one vehicle, which said vehicle is being operated in his taxi business and is fully qualified with both the County and the Alabama Public Service Commission, desires to use this, his only vehicle, in the transportation of his own immediate family between certain points. There is no switching of tags but only the use of this vehicle which bears taxi tags. Is this operator allowed to use this vehicle in such instances?

"I have read your opinion dated 26 May, 1947 at the request of Hon. Garnet Stancil, Mayor of Centreville, but to me it does not fully answer my question."

I have reviewed the opinion to Hon. Garnet Stancil, Mayor of Centreville, Alabama, under date of May 26, 1947, which you refer to. This opinion is reported in Quarterly Report of Attorney General, Vol. 47, page 108.

I concur in that part of the opinion which holds that vehicle licenses and tags cannot be interchanged. However, upon considered review, I dissent from that portion of the opinion which, in effect, holds that a vehicle for which a license and tag for public use has been obtained, cannot, in any event, be operated for private use.

I am not of the opinion that such a strict interpretation of Title 51, Section 695, Code of Alabama 1940, was intended by our Legislature. Section 695, supra, levies a tax on automobiles, motor cars or motor buses used for transporting passengers for hire. Subdivision (b) thereof requires that the person desiring to take out a license shall, at the time of making application, describe the route over which same shall be operated. It is my opinion that strict adherence to the described route above relates to those operations of the vehicle which involve a holding out to the public of the vehicle as one for transporting passengers for hire. In those instances where the vehicle is used for strictly private use, I conclude that the owner may operate the said vehicle at his pleasure. Whether or not said vehicle is being used for private or public use is a matter of factual determination to be established by enforcement authorities in each case. In view of the conclusion that vehicle licenses and tags are not interchangeable, a contrary holding would, in effect, mean that an individual could not make private use of his personally owned vehicle for purposes otherwise lawful per se.

"Statutes should receive a sensible construction, such as will effect the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion." **Birmingham Railway Light and Power Company v. Green**, 4 Ala. App. 417, 58 So. 801; **Ex Parte Rowe**, 4 Ala. App. 254, 59 So. 69.

In the case of **Interstate Commerce Commission v. Dunn**, 166 Federal Reporter (2d) 116, the U. S. Circuit Court of Appeals, Fifth Circuit, rendered an opinion holding in effect that a vehicle licensed to operate in intrastate commerce in Georgia, and therefore identified by license plates and the markings of the Georgia Public Service Commission, was not solely dedicated to that service and the owner of such vehicles could withdraw the vehicles from service as common carriers and subject said vehicles to private carriage. In view of the fact that an appeal was not prosecuted from the decision in this case, it must be considered the law of the land in the Federal Courts of the Fifth Circuit.

On the basis of the above, it is my conclusion that your question is properly answered in the affirmtaive, and you are so advised.

That portion of the opinion cited as Quarterly Report of Attorney General, Vol. 47, page 108, noted supra, which is in conflict with this opinion is hereby expressly overruled.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 6, 1949.

Hon. A. B. Jefferies, Chairman,
Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Statutes—Mobile County—Employees—Merit System.

1. Act No. 470, Local Acts 1939, page 298 (The Mobile County Civil Service System Act) is a pro tanto amendment of Sections 2 and 3 of Act No. 242, Local Acts 1935, page 141, insofar as the method of employment, the number and the compensation of the assistants in the office of the tax assessor of Mobile County is concerned.

2. The salaries of all assistants in the office of the tax assessor of Mobile County, including the two whose employment was originally authorized under Act No. 102, Local Acts 1936, page 61, should have been paid, since the effective date of Act No. 470, supra, and should now be paid, from the special fund created by Section 3 of Act No. 242, supra.

3. The general fund of Mobile County may not be reimbursed for the portions of the salaries of the two clerks in the office of the tax assessor of Mobile County, whose employment was originally authorized under Act No. 102, supra, paid from said fund in prior fiscal years, which should have been borne by the State of Alabama and the Board of School Commissioners of Mobile County.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion is as follows:

"Your official opinion directed to the Board of Revenue and Road Commissioners of Mobile County, Alabama is requested on the following:

"Act 241 of the Local Acts of 1935, approved August 15th, 1935, and found in Local Acts of 1935, page 139, as well as Act 242 found on page 141 of the same volume dealt with the Tax Collector and Tax Assessor of Mobile County.

"The sum and substance of Act 241 is to the effect that the Tax Collector gets a stipulated salary and, by Section Two of the Act, may employ such assistants to aid him as he may determine to be adequate to enable the proper discharge of the duties of his office. This is subject to a limitation as to number of employees and amounts of salary.

"By Section Three of the Act the Tax Collector may retain out of taxes collected by him the amount of his salary and the amount of the salaries of his assistants. Section Three provides that the amount of such salaries of the Tax Collector and his assistants shall be charged against, borne and retained respectively by, from and out of, taxes collected for the accounts of the State, the County of Mobile and the account of the Board of School Commissioners of Mobile County, in the ratio that the amounts collected respectively for these bodies bear to the total amount of taxes collected.

"A reference to Section Three of Act 242 on page 141 of the Local Acts of 1935 dealing with the Tax Assessor discloses a similar situation with reference to the retention by the Tax Collector of the salaries and the payment by the Tax Collector, the cost being prorated as provided in the other act. By Act 102 of the Local Acts of the Extra Session of 1936 found on page 61 of those acts and approved April 10, 1936 the Circuit Judges of this county are authorized to provide additional clerks in the office of the Probate Judge, Tax Collector, Tax Assessor, Clerk and Register, the salary of each to be paid out of the general funds of the county.

"In Act 265 of the Local Acts of 1939 found on page 155, approved August 24th, 1939 and effective January 1st, 1940 the provisions of Act 102 of the Extra Session of 1936 last quoted above were repealed.

"As I take it, that left in full force and effect the provisions of the Acts of 1935 on pages 139-141 first above cited.

"Local Act 194 of the Local Acts of Alabama of 1943 found on page 99 of those acts and approved June 18th, 1943 drastically amended Section Two of Local Acts of 1935, page 139, removing the limitation as to number of employees and providing for the Chief Clerk for the Tax Collector to have $3600 a year. This act left in effect, so far as I can determine, Sections 1, 3, 4, 5, 6, 7 and 8 of Act 241 (page 139 of Local Acts of 1935). It also left in effect Act 242 (Local Acts of 1935, page 141) in its entirety.

"However, between 1935 and 1943 there was adopted Act 470 of the Local Acts of 1939 found on page 298 and approved September 15th, 1939.

"Particularly Section 10 and 11 of that act seemed to grant full authority to the Personnel Board of Mobile County to fix the number of employees in various departments and the salaries of each.

"Having had the foregoing acts called to your attention, the question to be answered for the Board of Revenue and Road Commissioners of Mobile County is as follows:

"Does Act 470 of 1939 Local Acts, (page 298) have the effect of repealing the provisions of Section Two of Act 242 of the Local Acts of 1935 found on page 141?

"If your answer to this question is in the affirmative, what is the effect of Acts 470 of the 1939 Session of the Legislature on Sections Three of Acts 241 and 242 of the Local Acts of 1935?

"If your view is that Act 470 of the 1939 Session of the Legislature had the effect of authorizing the civil service system of Mobile County to prescribe the number of employees in the office of the assessor and collector (and the writer thinks it does), the following situation would occur:

"The Tax Assessor of Mobile County originally employed two stenographers under the authority of Act 102 of the Local Acts of 1936 (page 61, Local Acts of 1936) who were payable out of the general fund, when that act was repealed by Local Acts 1939, page 155, the Civil Service Law was adopted (Local Acts 1939, page 298). Thereafter, the two additional employees in the Tax Assessor's office were carried on the general payroll of Mobile County payable out of the general fund.

"If your judgment is that these two employees should have been paid by the Tax Collector out of funds held by him for payment of the salaries of his employees and those in the assessor's office, then should the amount which the county has paid from its general fund for salaries for these two employees in the Tax Assessor's office, since the repeal of Act 265 of Local Acts of 1939, effective January 1, 1940, be charged back and prorated between the State, County and School Board and should the Tax Collector be requested to withhold such amounts so charged back from tax collections for the current year and repay the amounts so withheld to the County general fund."

As you state in your letter of inquiry, the tax assessor of Mobile County was placed on a salary by Act No. 242, Local Acts 1935, page 141.

Section 2 of said act authorized the employment, by the tax assessor, at public expense, of certain assistants to aid him in the performance of his official duties; prescribed the maximum number of such employees; and the maximum amount of their compensation. Section 3 thereof provided for the payment of the salaries of the tax assessor and his assistants out of a special fund retained by the tax collector from ad valorem taxes collected by him. The last sentence of said Section 3 reads as follows:

> "The amount of such salaries of the tax assessor and his assistants, shall be charged against, borne and retained, respectively, by, from and out of, the taxes collected for account of the State of Alabama, the taxes collected for account of the County of Mobile, and the taxes collected for account of the Board of School Commissioners of Mobile County, in the ratio that the amounts collected respectively for the State, for the County of Mobile, and for the Board of School Commissioners of Mobile County, bear to the total amount of taxes collected."

A like statute, dealing with the office of the tax collector of Mobile County was passed at the same time (Act No. 241, Local Acts 1935, page 139); but, no question is here raised as to the fund from which the employees in the office of the tax collector, or any of them, should be paid. Therefore, no consideration will be given to this statute, or any amendment thereto, in this opinion.

By Act No. 102, Local Acts 1936, page 61, the legislature invested the circuit judges of Mobile County with the power to authorize certain officers of Mobile County, including the tax assessor, to employ clerks, in addition to those previously authorized by law, the salaries of such clerks to be paid out of the general fund of Mobile County. Under this act, the circuit judges of Mobile County authorized the tax assessor to employ two clerks, whose salaries were paid out of the general fund of Mobile County.

Thus, when the act establishing a county-wide Civil Service System in Mobile County (Act No. 470, Local Acts 1939, page 298) was passed and became effective, the tax assessor of Mobile County had the assistants authorized by Section 2 of Act No. 242, supra, whose salaries were paid out of the special funds created by Section 3 thereof, and two clerks authorized under the provisions of Act No. 102, supra, whose salaries were paid out of the general fund of Mobile County. (Act No. 470, supra, has been amended several times but not in respects here material.)

Act No. 102, supra, was either repealed by implication by Act No. 470, supra, on December 14, 1939 (See Sections XXXVI and XXXVII thereof), or specifically by Act No. 265, Local Acts 1939, page 155, on January 1, 1940. See **Heck v. Hall**, 238 Ala. 274, 190 So. 280; **Stone v. State ex rel. Goetz**, 30 Ala. App. 489, 8 So. 2d 208; and **Stone v. State ex rel. O'Connor**, 30 Ala. App. 500, 8 So. 2d 210. (As will hereinafter ap-

pear, the date on which said act was repealed is immaterial.) Nevertheless, it appears that after the effective date of the act creating a Civil Service System in Mobile County, the employment of the two clerks in the tax assessor's office, originally authorized under Act No. 102, supra, was continued, and that their salaries were still paid from the general fund of Mobile County.

There is no serious question as to the legal authority for their continued employment, in view of the following provisions of Section X of the Mobile County Civil Service System Act:

> "* * * * The Director of Personnel shall have authority to investigate concerning the number of employees in any department or office for employment and if in his opinion, after conference with the department head, there are an excessive number or an insufficient number of employees in proportion to the amount of work required in such department or office, the Director shall recommend to the Personnel Board that the excessive number of employees, if any there be, be laid off or transferred, either permanently or temporarily, in accordance with the provisions of this act, or the Director, if in his judgment there be an insufficient number of employees, may certify to the Appointing Authority additional names to fill such positions, and the Appointing Authority shall put into effect the order of the Personnel Board in any such respect."

See Mobile County v. State ex rel. Farmer, 30 Ala. App. 246, 3 So. 2d 435. However, there is a serious question as to the legal authority for the continued payment of their salaries from the general fund of Mobile County. Indeed, the main question presentd by your inquiry is whether or not the salaries of these two clerks were, since the effective date of the Mobile County Civil Service System Act, and are, properly payable from the general fund of Mobile County, or from the special fund created by Section 3 of Act No. 242, supra.

From a consideration of all the pertinent local acts, I am convinced that Act No. 470—the Mobile County Civil Service System Act, supra, is a pro tanto amendment of Sections 2 and 3 of Act No. 242, supra, at least insofar as the method of employment of the assistants in the tax assessor's office, the number of such assistants, and the amount of their compensation, is concerned. Cf. **Heck v. Hall; Stone v. State ex rel. Goetz;** and **Stone v. State ex rel. O'Connor,** supra. Examination of a recent payroll of the tax assessor's office shows that the above holding is in accord with the construction placed on these statutes by those charged with their administratoin or execution. Such an administrative construction is entitled to great consideration in the construction of statutes of doubtful meaning. See **Jefferson County v. Dockerty,** _____ Ala. App. _____, 30, So. 2d 469; certiorari denied in 249 Ala. 196, 30 So. 2d 474.

Since the Mobile County Civil Service System Act is a pro tanto amendment of Sections 2 and 3 of Act No. 242, supra, in the respects noted, it follows that the method of employment of all of the assistants

in the tax assessor's office, the number of such assistants, and the amount of their compensation are governed by the provisions of the Mobile County Civil Service System Act. This being true, it results, as a matter of course, that the compensation of all such assistants, since the effective date of the Mobile County Civil Service System Act, should have been, and should now be, paid from the special fund created by Section 3 of Act No. 242, supra. In reaching this conclusion, I am not unmindful of the fact that the salaries of the two clerks in the tax assessor's office, whose employment was originally authorized under Act No. 102, supra, have been paid, and are being paid, from the general fund of Mobile County, and that the conclusion here reached is contrary to the administrative construction placed on the pertinent statutes in this respect. However, I am unable to find any statutory authority for the payment of the salaries of these clerks from the general fund since the effective date of the Mobile County Civil Service System Act. Since that date, these two clerks have been employed and their compensation fixed by the same authority that employs and fixes the compensation of all of the other assistants in said office. In such a situation, the administrative construction placed upon the pertinent statutes is not controlling. In this regard, I quote from the opinion of the Court of Appeals, by Judge Carr, in **Jefferson County v. Dockerty,** supra:

> "We are not unmindful of the weight that we should give to 'Administrative Construction.' This rule, however, applies only where the intent and purpose of the statute is to the construing court of doubtful meaning. If the court is clearly of the opinion that the construction given the statute by the officers, who are charged with the duty of its enforcement, is erroneous, there remains no occasion or place for presumptions in favor of the method or manner of this enforcement.
>
> "As the Supreme Court observed in State et al. v. Tuscaloosa Building & Loan Association, 230 Ala. 476, 161 So. 530, 534, 99 A. L. R. 1019: 'We have no right, under the guise of construction, to re-write the law. We can only learn what they (the Legislature, we interpolate) intended, from what they have said. When their language is plain, no discretion is left with us. "We have no right to stray into the mazes of conjecture, or to search for imaginary purposes." '
>
> "To ignore this canon of construction would tend to misplace the responsibility now imposed upon the courts to construe the acts of the lawmaking bodies."

See, also, opinion of the Attorney General to Hon. Frank L. Haynes, Member of the Legislature, Hodges, Alabama, under date of November 16, 1948 and the authorities therein cited. A copy of this opinion is enclosed for your information.

The premises considered, I am of the opinion and hold that the salaries of the two clerks in the tax assessor's office, whose employment

was originally authorized under Act No. 102, supra, should have been, since the effective date of the Mobile County Civil Service System Act, and should now be, paid from the special fund created by Section 3 of Act No. 242, supra, and not from the general fund of Mobile County.

Having reached this conclusion, it becomes necessary to consider whether or not the general fund of Mobile County should now be reimbursed by the State of Alabama and the Board of School Commissioners of Mobile County for the portions of the salaries of these two clerks which they should have borne, but which were borne and paid by the general fund of Mobile County. I am of the opinion that there is no legal authority for the reimbursement of the general fund of Mobile County by the State of Alabama and the Board of School Commissioners of Mobile County for the portions of these salaries which they should have borne in prior fiscal years. This for the reason that the funds of one fiscal year may not be used for the payment of ordinary claims payable in a preceding fiscal year. See Opinion of the Justices, ——— Ala. ———, 36 So. 2d 475. The rule there announced, as to the funds of the State of Alabama, appears to be equally applicable to the funds of the Board of School Commissioners of Mobile County, in view of the statutory provisions governing the expenditure of school funds, especially Title 52, Sections 236-245, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 6, 1949.

Honorable C. R. Rea,
Mayor Pro Tem and Treasurer,
Town of Nauvoo,
Walker County,
Nauvoo, Alabama.

Municipalities—Streets.

Municipality may not spend public funds for benefit of individuals, but may assess cost of improvements to property owners.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of February 8, 1949, is as follows:

"The Town of Nauvoo requests an opinion from you regarding the following:

"Is the Town of Nauvoo liable for inlets and outlets to Privet property. In other words if a party builds a house is the Town under the State law required to build bridges, install drain pipes, and make necessary passage into such property.

"The Town is having demands made upon it for this kind of work, and we have heretofore refrained from going into this work, as we feel that we cannot spend Town money to benefit a special group. An opinion will be very much appreciated as it will set the question of all concerned straight."

Your attention is invited to Constitution of Alabama 1901, Article 4, Section 94, which provides as follows:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this State to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

In my opinion, the above constitutional provision prohibits a municipality from installing bridges, drain pipes and passage into private property for the benefit of individuals. If the Legislature cannot authorize a municipality to spend funds for a private purpose, certainly the municipality cannot do so of its own accord.

Your attention is further directed to 38 Am. Juris., Municipal Corporation, Section 395, which states, "A state legislature can neither compel nor authorize a municipal corporation to expend any of its funds for a private purpose, * * * *"

However, the provisions of Title 37, Sections 601 to 607, Code of Alabama 1940, authorize towns and cities to construct drains and sewers and to assess the cost against the property owners benefited. The cost of construction in such case becomes a lien upon the property.

Title 37, Sections 512, et seq., Code of Alabama 1940, provides for all types of public improvements and the assessments therefor.

In my opinion, the Town of Nauvoo is not authorized to build streets and drains free of charge, but by proper action of the governing body may build such streets and drains and assess the cost to the property owners.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 13, 1949.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile 15, Alabama.

Costs and Fees—Witnesses—Mileage—Officers and Offices—Sheriffs—Highway Patrolmen—Municipalities.

1. A highway patrolman, municipal police officer, or deputy sheriff appearing in court as a witness is entitled to five cents per mile to and from his residence.

2. Mileage fees accruing to highway patrolmen are required, by operation of law, to be paid into the Highway Patrol Fund.

3. The fact that a witness' transportation is paid by a governmental unit does not prohibit that person as a witness from claiming his mileage.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 18, 1949, is as follows:

"Your opinion is requested in reference to the following questions concerning witness fees:

"John Doe, a Deputy Sheriff, is stationed at Bayou La Batre, Mobile County, Alabama, and has for his use a county owned car. His salary is paid by the County of Mobile. This car, the gasoline, oil, upkeep, and other necessities for the operation of this car is furnished by the County of Mobile. Bayou La Batre is about twenty-five miles from the Mobile County Court House.

"Question 1—Is John Doe entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses such automobile?

"Question 2—Is John Doe entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses his personal automobile?

"John Smith, a State Highway Patrolman, is stationed at Robertsdale, Baldwin County, Alabama, and has for his use a state owned car. His salary is paid by the State of Alabama. This car, the gasoline, oil, upkeep, and other necessities for the operation of

this car is furnished by the State of Alabama. Robertsdale is about twenty-six miles from the Mobile County Court House.

"Question 3—Is John Smith entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses such automobile?

"Question 4—Is John Smith entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses his personal automobile?

"A. B. Sea, a Police Officer of the City of Prichard, is stationed at Prichard, Mobile County, Alabama, and has for his use a city owned car. His salary is paid by the City of Prichard. This car, the gasoline, oil, upkeep, and other necessities for the operation of this car is furnished by the City of Prichard. Prichard is about five miles from the Mobile County Court House.

"Question 5—Is A. B. Sea entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses such automobile?

"Question 6—Is A. B. Sea entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses his personal automobile?

"Tom Jones, a Police Officer of the Town of Chickasaw, is stationed at Chickasaw, Mobile County, Alabama, and has for his use a City owned car. His salary is paid by the Town of Chickasaw. This car, the gasoline, oil, upkeep, and other necessities for the operation of this car is furnished by the Town of Chickasaw. Chickasaw is about seven or eight miles from the Mobile County Court House.

"Question 7—Is Tom Jones entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses such automobile?

"Question 8—Is Tom Jones entitled to mileage when he is summoned as a State witness in the Circuit Court when he uses his personal automobile?

"Your attention is respectfully called to the following:

"1. Quarterly Report of the Attorney General for the period from October 1, 1947, thru December 31, 1947, Vol. 49, Pages 71 and 72, especially the last paragraph of this opinion.

"2. Title 36, Section 71, Code of Alabama of 1940, as found in the 1947 Cumulative Pocket Part.

"3. Quarterly Report of the Attorney General, January-March, 1940, Page 225."

All of your inquiries may be answered together, as the same principle of law governs each of the cases outlined.

It is my opinion that all of the witnesses referred to in your inquiry, highway patrolmen, deputy sheriffs, or municipal police officers, are entitled to mileage, regardless of the means of conveyance which said witnesses used in reaching the courthouse. In the case of highway patrolmn, by operation of the law, their mileage should be paid into the Highway Patrol Fund.

A person who is summoned and appears as a witness in a criminal case is entitled to five cents per mile to and from his residence. Title 11, Section 193, Code of Alabama 1940. The witness is entitled to this compensation as an individual witness, and is not entitled to it by reason of the fact that he holds any particular office or employment such as a highway patrolman, deputy sheriff, or a municipal policeman. See Quarterly Report of Attorney General, Vol. 3, page 35, 36; Vol. 49, page 71; Vol. 18, page 10; Vol. 9, page 177.

The fact that some of these witnesses are employed by a governmental unit, such as a city, county, or the State, which furnishes to said employee an automobile, gasoline, and other traveling expenses, does not, in my opinion, prohibit the witness from claiming his mileage as a witness. He makes this claim in the capacity as an individual and not in the capacty as an officer of the law. As far as the clerk of the circuit court is concerned, therefore, it is immaterial how a State's witness reaches the courthouse. He is entitled to his mileage as provided by law.

The fact that such witnesses have available to them governmentally owned automobiles, the expenses of which are paid, may result in double payment to the witnesses. For that reason, some statutes provide that mileage fees must be paid back to the governmental unit. This is true in the case of highway patrolmen. The clerk of the court is required to collect mileage fees for highway patrolmn, who have been witnesses, but, by operation of the law, the clerk must forward this mileage to the Highway Patrol Fund, the fund from which the expenses of transportation was originally paid. Title 36, Section 71, Code of Alabama 1940, as amended by Act No. 446, General Acts 1943, page 408, approved July 8, 1943.

As to whether or not the governmental unit furnishing transportation to the municipal police officer and the deputy sheriff is entitled to the mileage which its employees claim is a matter which addresses itself to the Legislature. It is within the power of the Legislature to require that mileage fees paid an employee who is otherwise compensated for his mileage be paid to the governmental unit bearing the

expense. In the absence of such legislation, however, I find no law requiring the witnesses, municipal police officers or deputy sheriffs, to do so.

It should also be stated that appearing in court as a witness is an individual matter and not an official duty of a municipal police officer or a deputy sheriff. The fact that he uses his official car with expenses paid by his employer is perhaps a wrongful use of that car, unless said officer bears the expense of transportation himself or pays his mileage fee to his employer, or the agency bearing the expense of transportation. But this is no concern of the circuit clerk.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 15, 1949.

Hon. J. Massey Edgar,
Attorney for Court of County Commissioners,
Choctaw County,
Butler, Alabama.

Counties—Agriculture and Industries.

Appropriating funds to the Choctaw County High School to be used in building a canning plant for the promotion of agriculture in the county is a matter that is within the discretion of the Governing Body of Butler County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of April 5, 1949, is as follows:

"The Choctaw County High School is desirous of building a canning plant at Butler for the furtherance and promotion of Agriculture.

"The Court of County Commissioners are desirous of making an appropriation out of the funds of Choctaw County to the school for this purpose.

"Does the Court of County Commissioners have the authority under the law to make such appropriation for the said purpose?"

In answering your inquiry, if the governing body of Butler County is of the opinion that the canning plant will help promote the agricultural

resources of the county, then it is my judgment that the governing body may make the appropriation to the school for the purpose of assisting in the building of the canning plant.

This appropriation may be made under Title 12, Section 12, Subsection 22, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, which provides, in part, as follows:

> "To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. * * * "

This office has recently held that county governing bodies may appropriate and expend funds for the following in connection with the agricultural growth of the counties:

> Donating to the Piedmont Livestock Show Barn and Youth Center, Incorporated, is a matter that is within the discretion of the Governing Body of Chambers County;

> Baldwin County to appropriate county funds to a Cattle Show and Fair Association, a nonprofit corporation organized for the purpose of developing the livestock industry in the county.—Quarterly Report of Attorney General, Volume 51, page 151;

> Elmore County authorized to appropriate county funds to the Elmore County Artificial Breeding Association, a nonprofit organization, organized for the purpose of developing and promoting a better cattle program for the county.—Quarterly Report of Attorney General, Volume 49, page 86;

> County governing bodies authorized to appropriate and expend funds in assisting the Production Marketing Association in the payment of office rent in the furtherance of and promotion of agriculture.—Quarterly Report of Attorney General, Volume 46, page 127;

> To purchase a motion picture machine for the sole use of County Extension Service Agents in projecting visual education on farm subjects.—Quarterly Report of the Attorney General, Volume 39, page 52.

See also opinion of this office found in Quarterly Report of Attorney General, Volume 39, page 8, which held:

> "County governing bodies authorized to make such appropriations of county funds as are reasonably necessary to provide 'canning

plants' or buildings and equipment necessary for instruction, training, and education in the art of canning, in connection with appropriations by the federal government for vocational education."

The premises considered, it is my opinion that the question of appropriating funds to the Choctaw County High School to be used in building a canning plant, for the promotion of agriculture in the county, is a matter that is within the discretion of the County Governing Body of Choctaw County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1949.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Judges of Probate—Morgan County.

A city directory may be purchased by the Board of Revenue and Control of Morgan County for the use of the office of judge of probate, and such directory is a necessary book or equipment within the meaning of Act No. 70, Local Acts 1943, page 34, approved May 28, 1943.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 7, 1949, is as follows:

"The Probate Judge's office of Morgan County, Alabama, was placed on a salary basis by a local Act of the Legislature of 1943, which was known as Act No. 70, and is on Page 34 of said local Acts.

"Under Section 4 of this Act, 'The Board of Revenue & Control of Morgan County is required to furnish the Judge of Probate with the necessary books, records, equipment, furniture, fixtures, stationery, postage and other supplies necessary to run the office.'

"As you know one of the duties of the Probate Judge is to classify the qualified voters in each precinct into boxes or districts. There are nineteen boxes in precinct No. 1, which is Decatur proper.

In these nineteen boxes there are about 6000 voters. Decatur, like all towns, has had a mushroom growth during the last four or five years, and a number of new sub-divisions.

"There has just been completed a new city directory for the City of Decatur, which gives the names and addresses of all persons living within the corporate limits. With the aid of this book, it would be much easier and our list would be more accurate in placing the voters in the boxes where they vote.

"Will you please give me the benefit of your official opinion as to whether or not the Board of Revenue & Control of Morgan County would be in its legal rights in furnishing the Probate Office this directory and pay for it from the General Fund of the County."

In my opinion, the Board of Revenue and Control of Morgan County may, in its discretion, purchase for the use of the office of the probate judge a city directory as described in your inquiry.

Clearly, the Board of Revenue may determine that such a directory is a necessary book or necessary equipment within the meaning of Section 4 of Act No. 70, Local Acts 1943, page 34.

This opinion is not in conflict with an opinion of the Attorney General under date of November 4, 1947, addressed to Hon. J. A. Logue, Judge of Probate of Houston County, Quarterly Report of Attorney General, Vol. 49, page 93, wherein it was held that the county was without authority to purchase a city directory for the use of various offices in the county courthouse. The opinion referred to was decided on the basis of the general law. In the case outlined by your inquiry, the local law is sufficient authority for the purchase.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 19, 1949.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Judge of Probate—Morgan County.

An intercommunication system may be purchased by the Board of Revenue and Control of Morgan County for the use of the office of the judge of probate, and may be considered necessary equipment within the meaning of Section 4 of Act No. 70, Local Acts 1943, page 34, approved May 28, 1943.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 7, 1949, is as follows:

"The Probate Judge's Office of Morgan County, Alabama, was placed on a salary basis by a local Act of the Legislature of 1943, which was known as Act No. 70, and is on Page 34 of said local Acts.

"Under Section 4 of this Act, 'The Board of Revenue & Control of Morgan County is required to furnish the Judge of Probate with the necessary books, records, equipment, furniture, fixtures, stationery, postage and other supplies necessary to run the office.'

"All recording in the Probate Office is done with Photostat equipment. This equipment is located in the basement. In order for the Filing Clerk to talk to the Recording Clerk, which she has to do many times a day, it is necessary for her to walk through two vaults, the back office and down the steps to confer with the Recording Clerk about any instrument in question.

"I would like to purchase for the use in the Probate Judge's Office an intercommunication system, which would save much time in this work.

"Will you please give me the benefit of your official opinion as to whether or not the Board of Revenue & Control of Morgan County would be in its legal rights in furnishing the Probate Office with an intercommunication system."

It is my opinion that the Board of Revenue and Control of Morgan County may, in its discretion, consider that the intercommunication system referred to in your inquiry is equipment necessary for the use of the probate judge within the meaning of Section 4, Act No. 70, Local Acts 1943, page 34, approved May 28, 1943.

Cf. Quarterly Report of Attorney General, Vol. 50, page 9.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 19, 1949.

Hon. J. L. Killian, Sr.,
Judge of Probate, Lee County,
Opelika, Alabama.

Licenses—Vending Machines—Bottling Companies—Alabama Polytechnic Institute.

1. A bottling company, which places soft drink vending machines in different locations throughout Alabama Polytechnic Institute, charges the college the wholesale price for the drinks, a rental charge for each machine, and State sales tax, and services the machines, and pays to the college the difference between the price of the drinks, rental charge of the machine, and State sales tax, is the operator of the machines and liable for the vending machine license levied under the provisions of Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, General Acts 1947, page 522.

2. If the bottling company operated the machines under the same arrangement, except that the machines were sold to the college under a conditional sales contract, rather than rented to the college, the bottling company is the operator of the machines and is liable for the licenses on such machines.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 26, 1949, is as follows:

"I am writing to you for ruling as to who should pay licenses, if any, on the following soft drink vending machines used under the following circumstances:

"A local soft drink bottler owns a number of vending machines which it rents to Alabama Polytechnic Institute in Auburn, Alabama, under an arrangement with the College as follows:

"The vending machines are placed in different locations throughout the college in locations approved by the College. The bottler supplies the machines with soft drinks, charges the College the usual wholesale rate for the soft drink, plus the State sales tax, the charge made by the bottler being broken down as follows:

"Each case of twenty-four bottles	.80c
Machine charge and rental charge per case	.10c
State sales tax per case	.024c
Total	.924c

"The bottler has the usual bottler's license and is not engaged in a retail business, selling its soft drinks throughout the County to retailers.

"The money is collected from the vending machines by the bottler and all proceeds therefrom are turned over to the College less the .924c per case, this .924c per case of 24 bottles being retained by the bottler to cover the wholesale price of soft drinks (80c per case), the machine rental charge (10c per case) and the State Sales Tax (.024c) per case).

"It would appear that the tax for the operation of these vending machines should be paid by the lessee, the College, but, as you know, the College is exempt from taxes.

"Under the above arrangement, it is doubtful from whom to collect the license, if any, on the vending machines so used.

"The license tax on vending machines about which I am inquiring is that levied by Section 613 of Title 51 of the Alabama Code of 1940. See also Section 482, Title 51 of the Alabama Code of 1940.

"Would the liability for the vending machine license be on the bottler or the College if the machines were owned by the College instead of being rented by the College, the machines being sold to the College under conditional sales contracts, and 10c per case being retained by the bottler and applied on the purchase price of the machines until the machines were paid for?

"Bottlers in this County also have with the Tuskegee Institute the same arrangement as that outlined above with the College in Auburn, Alabama. Who should pay the vending machine license on vending machines in use at the Tuskegee Institute?"

The license on vending machines is levied by Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, General Acts 1947, page 522, which provides in part as follows:

"For each machine for vending * * * soft drinks, * * * $8.00 for each machine that may be operated by nickels or coins of a larger denomination; and a separate license shall be issued for each such machine * * * * * * The licenses herein provided for shall be levied upon the operator of the machine, * * * * * *"

The above license is not levied on the machine itself, but is levied on the operator of the machine. Quarterly Report of Attorney General, Vol. 48, page 16. Cf. Quarterly Report of Attorney General, Vol. 46, page 162, which opinion overrules Quarterly Report of Attorney General, Vol. 41, page 43.

In the case of **State v. Woods**, 242 Ala. 184, 5 So. 2d 732, the court said:

> "We may observe, as a matter of common knowledge, that many places of business rent space in their establishment to third persons who may and do conduct their own and different businesses in such space or department so rented. Such space or department becomes, and is, a separate place of business,—the business of such third party. If, therefore, a vending machine owner rents (method of payment immaterial) space for a vending machine and such space becomes his place of business (special or limited), in the conduct of his business he thereby makes himself * * * liable for the tax * * * within the terms of the * * * vending machine statute in question."

Under the facts stated in your inquiry, whether the machines are rented to Alabama Polytechnic Institute or sold to said college under a conditional sales contract, it is my conclusion that the bottling company is the operator of the machines. Ownership of the machines is not controlling in determining the liability for vending machine license. The difference in the charge made by the bottling company for the case of drinks, rental charge on the machine, and the State sales tax, and the money collected by the bottler from the vending machine for the sale of the drinks is the rent paid by the bottling company for conducting the business in the space occupied by the machines.

In view of the above conclusions, it is my opinion that the bottling company is liable for the vending machine license levied by the provisions of Section 613, as amended, supra, whether the machines are rented to the college or sold to the college under a conditional sales contract and ten cents per case retained by the bottler and applied to the purchase price of the machines until the machines are paid for.

Your inquiry in reference to Tuskegee Institute is answered by my answer to your first inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1949.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
Montgomery 4, Alabama.

Fine and Forfeiture Fund—Criminal Law—Timber.

1. An affidavit, information, or indictment following the words of a statute is based upon that statute.

2. When there is no specific provision directing the disposition of fines and forfeitures, the same must be paid into the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 11, 1949, is as follows:

"Title 14, Section 429, Code of 1940, reads as follows:

" 'Trespass upon the lands of the state.—Any person who knowingly and wilfully enters upon the lands of the state and cuts any timber, or cultivates such land, or otherwise appropriates the same to any private use without lawful authority, shall, on conviction be fined not less than one hundred dollars, and may also be imprisoned in the county jail for not more than thirty days.'

"Title 8, Section 218(1), 1947 Supplement, Code of 1940, reads:

" 'Unlawful cutting, removing, etc., of timber or forest products; penalty.—Any person or persons who shall (1) wilfully and knowingly cut, kill, destroy, girdle, chop, chip, saw, or otherwise damage timber or forest products not his own or without authority of the legal owner; (2) wilfully and knowingly remove timber or other forest products other than his own or without authority of the legal owner; (3) wilfully and knowingly transport timber or other forest products which have been severed or removed in violation of subsections 1 or 2 of this section; (4) wilfully and knowingly purchase or contract to purchase or otherwise obtain timber or forest products severed, removed or transported in violation of subsections 1, 2 or 3 of this section; (5) wilfully and knowingly sell, contract to sell or otherwise dispose of logs, poles, piling, cross ties, pulpwood, veneer bolts, staves or other unmanufactured or semi-manufactured forest products not his own or without authority of the legal owner, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than one thousand dollars and may also be imprisoned in the county jail or sentenced to hard labor for not less than ten days nor more than twelve months.'

"Title 8, Section 218(6), 1947 Supplement, Code of 1940, reads:

" 'Disposition of fines.—All fines collected from violation of sections 218(1) and 218(4) of this title shall go to the division of forestry, department of conservation.'

"When a defendant is arrested and subsequently convicted under a warrant reading 'did knowingly and wilfully enter upon the lands

of the State of Alabama and did cut timber on said lands, or otherwise appropriate the same to his private use without lawful authority' and the County Solicitor who prosecuted the case states that the warrants were based on Section 429, Title 14, Code of 1940, please give me your official opinion on the following question:

"Based on the above statement of facts, should the Clerk of the trial court remit funds collected to the County Fine and Forfeiture Fund or should he remit under Section 218(6) of Title 8, to the Division of Forestry, Department of Conservation?

"An early reply will be greatly appreciated."

It is obvious that the charge as quoted in your inquiry, "did knowingly and wilfully enter upon the lands of the State of Alabama and did cut timber on said lands, or otherwise appropriate the same to his private use without lawful authority," is based upon Title 14, Section 429, Code of Alabama 1940, and not upon Act No. 629, General Acts 1939, page 993, approved July 10, 1940 (1947 Cumulative Pocket Part, Title 8, Section 218 (1), Code of Alabama 1940).

The charge directly follows the words of Title 14, Section 429, Code of Alabama 1940, and does not follow the words of Act No. 629, supra.

Since there is no specific provision for the disposition of fines collected for violations of Section 429, supra, it is my opinion that said fines should be paid into the fine and forfeiture fund of the county. Title 15, Section 392, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

April 19, 1949.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Licenses.

The McPoland Typewriter Exchange, as agent for the Royal Typewriter Company, Inc., is not liable for a license under Title 51, Section 454, Code of Alabama 1940.

The Royal Typewriter Company, Inc., is liable for a license under Title 51, Section 454, Code of Alabama 1940, for sales made in Walker County by its agent, the McPoland Typewriter Exchange.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of March 30, 1949, is as follows:

"Recently several concerns engaged in the operation of typewriter shops have been cited to buy a license under Title 51, Section 454, 1940 Code of Alabama, which reads as follows:

" 'Each person engaged in the business of selling adding machines, calculating machines, comptometers, billing machines, bookkeeping machines, cash registers, typewriters, or similar machines, shall pay the following annual privilege tax: * * * In counties of over sixty thousand inhabitants and not over one hundred thousand inhabitants sixty dollars; * * *'

"The operators of these establishments maintain that they are the agents for various typewriter concerns and therefore not liable for this license. I cite you as an example applicable to all cases, the case of McPoland Typewriter Exchange, Jasper, Alabama. Mr. McPoland states that he is an agent for the Royal Typewriter Company, Inc., the nearest branch of which is located in Birmingham, Alabama, and that he is an agent for them; that he takes orders and the orders are filled by the Royal Typewriter people and that they, the Royal people, handle the billing, shipping, etc., and are accountable to the State of Alabama and the Federal Government for the taxes on said machines, and that McPoland Typewriter Exchange is paid a commission on the sales by them for all typewriters, adding machines, cash registers, etc., that they sell.

"The McPoland Typewriter Exchange however does maintain a show room display and advertises for sale to the general public typewriters, and they may at times sell machines for cash to any one who may call for them and which the customer may carry away with him; that the whole amount of money for these machines is paid to the Royal Typewriter people and the McPoland Typewriter Company is later given its commission by check for these sales.

"McPoland Typewriter Exchange maintains that as an agent for the Royal Typewriter Company it is not subject to the above cited licenses, and that it is authorized to operate as an agent in this county under the license issued to the Royal Typewriter Company in Jefferson County, Alabama, or that it is in interstate commerce and therefore not liable for any license due to the fact that the Royal Typewriter Company's home office is located in New York.

"In view of the foregoing, will you please give me your opinion on the following:

"1. Is the McPoland Typewriter Exchange subject to the license provided in Section 454, Title 51, 1940 Code of Alabama?

"2. If your answer is in the negative, would the Royal Typewriter Company be subject to the license above cited? In short, would the term 'each person engaged in the business of selling * * typewriters,' mean the person actually engaged in taking the orders for said machines or the company for which he is taking the orders?

"In view of the fact that these typewriter agents do not feel that they are subject to this license, I would greatly appreciate a very early reply from you in order to determine their liability for this year as soon as possible."

In answering your questions, in my opinion the McPoland Typewriter Exchange is not liable for a license under Title 51, Section 454, Code of Alabama 1940, as from your facts the McPoland Typewriter Exchange sells only as agent for the Royal Typewriter Company, Inc., in Walker County. The Royal Typewriter Company, Inc., is liable for a license under said Section 454, supra, for the sales made by its agent, the McPoland Typewriter Exchange, Inc., in your county. The fact that the Royal Typewriter Company, Inc., has procured a license in Jefferson County does not exempt it from liability for another license in Walker County.

Title 51, Section 831, Code of Alabama 1940, as amended by Act No. 546, General Acts 1943, page 535, approved July 10, 1943, provides, in part, as follows:

"Before any person, firm, or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the State Department of Revenue, as specifically the amount required for such license, and shall comply with all the other requirements of this title; * * *"

In my opinion, the question of interstate commerce is not involved in your request as Title 51, Section 454, Code fo Alabama 1940, provides for a nondiscriminatory privilege license. **State v. Stein**, 240 Ala. 324, 199 So. 13.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 20, 1949.

Hon. E. S. Tunstall,
Tax Assessor,
Baldwin County,
Bay Minette, Alabama.

Boards of Equalization—Time of Meetings.

Boards of Equalization are without statutory authority to meet prior to the first Monday in June of each year. Title 51, Section 107, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of March 28, 1949, is as follows:

"Under Title 51 Section 107 Code of Alabama the Board of Equalization sits to hear protests to valuations on the second Monday in June.

"What I would like to know is, have they got the authority to sit earlier to hear protests, say begin the hearings on the second Monday in May.

"My reasons for asking this is the Board has finished reviewing the assessments, the protests will all be in by April 25th, and by hearing what protests that are in, it will enable me to finish my work sooner, since I have so many more assessments now than any previous year. The Board is willing and wants to finish so the members that farm can harvest their potatoes."

Title 51, Section 107, Code of Alabama 1940, directs the period of time during which the board of equalization shall meet for the purpose of hearing protests which are duly filed to assessments or valuations. The pertinent provisions of that Section are as follows:

"§107. Meetings to hear objections to valuations; procedure.—For the purpose of hearing objections filed in writing to any assessments or valuations fixed as provided for herein, the board of equalization shall sit at the courthouse in their respective counties on the first Monday in June in each year, from nine a. m. to five p. m., and shall continue as long as may be necessary, provided such sitting shall not be extended beyond the second Monday in July, **unless otherwise ordered by the department of revenue,** to dispose of

all cases where objections to valuations or assessments have been filed in writing by any taxpayer, as provided in this chapter. * * * *." (Emphasis supplied.)

In view of the above-quoted statutory provision, boards of equalization are clothed with such authority to so act upon said objections during the express period as provided for by said statute. They are without authority to act at any other time. The proviso, "unless otherwise ordered by the department of revenue," is limited merely to the statutory provision which states that such meeting shall not continue beyond the second Monday in July. Therefore, the department of revenue may order an extension of time, but said department is without authority to order the boards of equalization to begin hearing protests prior to the first Monday in June.

In view of the above, I am of the opinion that your inquiry must be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 25, 1949.

Hon. J. Massey Edgar,
Councilman,
City of Butler,
Choctaw County,
Butler, Alabama.

Municipal Corporations—Towns.

All actions for violations of the ordinances of the Town of Butler should originate before the Mayor as ex officio recorder of the Town.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of April 5, 1949, is as follows:

"The Town of Butler is an incorporated town but does not have a Mayors Court or any city court.

"The town through its duly elected officers have enacted ordinances regarding privilege license.

"You will please advise what court or courts of the county have original jurisdiction for the prosecution of persons who fail to take out privilege license for the operation of businesses within the corporate limits."

In answering your question, it is my opinion that all actions for violations of the town's ordinances should originate before the Mayor as ex officio recorder of the town.

Title 37, Section 406, Code of Alabama, expressly prohibits a town, as defined under Section 5 of said title, from having a recorder, but Section 600 of said title provides that in a town having no recorder the mayor shall be ex officio recorder. Said section reads as follows:

"§600.—In cities and towns having no recorder, the mayor shall be ex-officio recorder, and his compensation as mayor shall include his compensation for holding such office. The council may determine, by ordinance, the costs of the court, but in no case to exceed costs allowed state officers for similar services, and such costs shall be paid into the city treasury."

Title 37, Section 585, Code of Alabama 1940, provides as follows:

"§ 585.—It shall be the duty of the recorder to keep an office in the city, and hear and determine all cases for the breach of the ordinances and by-laws of the city that may be brought before him, and he shall make report, at least once a month, of all fines, penalties and forfeitures imposed by him, or by any councilman in his stead. Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex officio justice of the peace, except in civil matters. In the absence from the city, death, disability, or inability of the recorder, any councilman may act as such recorder with his full power and authority."

See opinion of this office found reported in Biennial Report of Attorney General, 1920-22, page 188, which holds that the Mayor of Mignon, Alabama, acting as ex officio recorder, may commit to the Alabama Boys Industrial School boys brought before him for violations of laws or ordinances.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 29, 1949.

Hon. Ralph P. Eagerton, Chief Examiner,
Examiners of Public Accounts Department,
CAPITOL.

Taxation—Exemption—Schools.

Board of education, schools and other educational institutions of the State of Alabama, as agencies of the State of Alabama, are exempt from the payment of Federal Excise tax imposed by the Revenue Act of 1941.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of February 9, 1949, is as follows:

"I have been requested by Mr. Harper of the State Department of Education to ask for your official opinion on the following question.

"Is the County Boards of Education, High Schools, and other educational institutions which are agencies of the State of Alabama, exempt for Section 3406 Federal Excise Tax imposed by Revenue Act of 1941.

"I hand you herewith a copy of a ruling of the Deputy Commissioner of Treasury Department, Bureau of Internal Revenue, and also copy of Section 3406, Chapter 29, as amended to August 8, 1947."

I am of the opinion that your request should be answered in the affirmative.

Section 3406 of Chapter 29 of the Internal Revenue Code, as amended August 8, 1947 (Title 26, Section 3406, U. S. C. A.), reads as follows:

"(a) Imposition.—There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):

"(1) SPORTING GOODS— * * * * * * : 10 per centum."

Section 3442, Chapter 29, Internal Revenue Code (Title 26, Section 3442, U. S. C. A.) provides as follows:

"Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed with respect to the sale of any article.

"(3) For the exclusive use of any state, territory of the United States, or any political subdivision of the foregoing, or the District of Columbia."

The county boards of education, high schools and other educational institutions of the State of Alabama are considered as agencies of the State. **Turk v. County Board of Education of Monroe County**, 222 Ala. 177, 131 So. 436.

In view of the fact that these institutions are State agencies, I am of the opinion that they are entitled to the exemption as provided for in Section 3442, supra, which exempts the sale of sporting goods which are for the exclusive use of any State.

In further support of this contention, it is to be noted that a similar ruling was made by the Attorney General of the State of New York on October 27, 1941 and March 19, 1945. It is also to be noted that the Commissioner of Internal Revenue has made a similar ruling as referred to in your request. That ruling reads as follows:

"A ruling is requested as to the application of this tax with respect to athletic equipment and supplies purchased by high schools with payment for the equipment and supplies being made from funds administered by the high school principal or by someone whom he appoints.

"It is the position of the Bureau that exemption from the manufacturers' excise tax as authorized under section 3442(3) of the Code applies in respect of articles sold for the exclusive use of educational institutions which are operated and supported by a State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia, and for which payment for the articles is made from funds under the exclusive control of the educational institutions. The exemption applies irrespective of the fact that the funds under the exclusive control of the educational institution may contain money other than that appropriated by the State, etc.

"The ruling set forth above will apply in respect of taxable articles purchased for the exclusive use of the public high schools of the State of Virginia."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 29, 1949.

Honorable W. P. Dodson,
Commissioner,
Fayette County Commissioners' Court,
Fayette, Alabama.

Constitutionality—Fayette County—Probate Court—Salaries.

1. Act No. 559, Local Acts Alabama 1947, providing for Chief Clerk of Probate Court in Fayette County, does not violate Section 96, Constitution of Alabama 1901.

2. Compensation of five cents per name, as provided for in Title 17, Section 55, Code of Alabama 1940, may be paid to Chief Clerk of Probate Court.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of February 28, 1949, is as follows:

"Your official opinion is respectfully and immediately requested on the following:

"A local law was passed by the 1947 Legislature (page 375) authorizing and empowering the Judge of Probate of Fayette County to appoint a Chief Clerk and to fix his salary at not more than $150.00 per month to be paid from the General Fund of the County.

"The Constitution of Alabama 1901, Section 96 prohibits the Legislature from enacting 'any law not applicable to all the counties of the State, regulating costs and charges of Courts or fees, commissions, or allowances of such officers.'

"1. Can the Legislature pass a local law applicable to only one county whereby an official is on a fee basis supplementing his fees?

"2. If the above question is answered in the affirmative, can the Chief Clerk of the Probate Office, drawing a salary of $150.00 per month, paid by the County, be paid for preparing a list of the qualified electors provided by Title 17, Section 55 of the Alabama Code of 1940."

Section 96, Constitution of Alabama 1901, provides as follows:

"Sec. 96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Your attention is directed to the case of **Brandon, Auditor v. Askew, Solicitor**, 172 Ala. 160, 54 So. 605. The case held in part as follows:

> "A salary is a fixed compensation 'decreed by authority and for permanence,' is paid at stated intervals and depends upon the time, and not the amount of services rendered. * * * Allowances are of the same nature with fees, costs, commissions, and percentages. They are uncertain and variable in amount. They depend upon the rendition of services which may or may not be required or prformed, and sometimes upon the discretion of the court ordering their payment."

The Act in question, Act No. 559, Local Acts 1947, page 375, provides for a salary to be paid to the Chief clerk and the compensation so paid is not a fee, commission, or allowance, as contemplated by Section 96 of the Constitution.

Your attention is further directed to the case of **State, ex rel Ward v. Henry**, 224 Ala. 224, 139 So. 278, in which the court, speaking of Section 96, Constitution of Alabama 1901, said:

> "This section is limited to 'public officers' common to 'all the counties in the state.' It was never intended to fix a static and rigid county organization. It does not prevent the creation of new offices to meet the needs of a county or class of counties growing out of increased population, and the fixing of their compensation."

In view of the above decisions, it is my opinion that Act No. 559, Local Acts 1947, page 375, is not violative of Section 96 of the Constitution of Alabama 1901.

Title 17, Section 55, Code of Alabama 1940, authorizes the judge of probate to employ assistants and clerical help to prepare the list of qualified voters. I call your attention to Quarterly Report of Attorney General, Volume 26, page 125, where an opinion concerning Title 17, Section 55, holds in part as follows:

> "It is a matter of common knowledge that the duties (sic) to be performed by the assistants and clerks in the above quoted code section is what might be termed an extra-curricular duty imposed upon the office of the Probate Judge. This duty is to be performed only when an election is to be held in the county, and, in my opinion, the duty to be performed by such assistants and clerks could not be properly termed the ordinary and everyday duties of the office of the Probate Judge."

In **Aldredge, et al. v. Bailey**, 29 Ala. App. 44, 191 So. 647, cert. den. 238 Ala. 441, 191 So. 649, the Court of Appeals, in construing Section 402, Code of Alabama 1923, as amended by General Acts 1927, page 277, which

is substantially Title 17, Section 55, Code of Alabama 1940, held as follows:

"The only limitation placed on the Probate Judge is that he cannot contract such assistants and clerical help for more than 5 cents per name. The Legislature, whether wisely or not, left the discretion in making this contract and fixing the amount with the Probate Judge of the County, and his is the responsibility."

Therefore, it is my opinion that the money to be expended in compiling the list of electors under Title 17, Section 55, Code of Alabama 1940, could legally be paid to the Chief Clerk of the Probate Office if he does the work.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 29, 1949.

Hon. J. E. Pittman, Chairman,
County School Board,
Coffee County,
Enterprise, Alabama.

Teachers—Schools—Salaries Contracts.

There is no distinction under the provisions of the Teacher Tenure Act between tenure as an instructor and tenure as a principal. The term "teacher" as used in said Act includes principals as well as instructors.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of November 19, 1948, is as follows:

"We have a teacher in Coffee County who has taught in the county for 17 years. Six years ago she was made principal of an elementary school in the county, which position she held for three years. She was then transferred to a junior high school in the capacity as classroom teacher, where she served one year. At the beginning of the next year she was made principal of the junior high school in which capacity she served for two years, and until the 1947-1948 term of school closed. The question has arisen whether said teacher can be transferred to the position as classroom teacher in the junior high school where she was principal for two years.

"The question seems to be whether under the provisions of Title 52, Section 352, Code of Alabama 1940, there would be any distinction in tenue as a teacher and tenue as a principal. Specifically, does a teacher have to serve three years as a principal before they can be removed from one school, position or grade to another, that is, removed to a lower position, or grade such as from principal to classroom teacher; or, does the fact that such teacher has taught three years as a teacher give them tenue so that they cannot be removed even though they have served as principal for only two years.

"In explanation of paragraph 1, above, the transfer from principal of the elementary school to class room teacher in the junior high school was done in consolidation of the two schools, and with her permission.

"As regards the questions contained in paragraph 2, above, the proposed change from the status as principal to that of class room teacher is without the teacher's consent. The transfer has been made and the proposition before the School Board is whether the teacher is entitled to the same pay that she received last year while serving as principal."

In view of the express provisions of Title 52, Section 351, Code of Alabama 1940, I am of the opinion that there is no distinction in tenure as a teacher and tenure as a principal within the meaning of the Teacher Tenure Act (Title 52, Chapter 13, Code of Alabama 1940). Title 52, Section 351, supra, reads as follows:

"§351. 'Teacher' defined.—The term teacher as employed in this chapter is deemed to mean and include all persons regularly certificated by the teacher certificating authority of the State of Alabama who may be employed as instructors, principals or supervisors in the public elementary and high schools of the State of Alabama."

Thus it is noted from the above-quoted statutory provision that the term "teacher" as used in the Teacher Tenure Act means and includes principals as well as instructors.

Title 52, Section 352, Code of Alabama 1940, states the conditions under which a teacher attains continuing service. Section 352, supra, reads as follows:

"§352. Teachers who may attain continuing service status.—Any teacher in the public schools, who shall meet the following requirements, shall attain continuing service status: (a) Such teacher shall have served under contract as a teacher in the same county or city school system for three consecutive years and shall thereafter

be re-employed in such county or city school system. (b) Such continuing service status can be conferred only by the re-employment of such teacher for the school year beginning in the fall of 1940, or for some subsequent school year."

This statutory provision accepts and uses the term "teacher" as defined by Section 351, supra. Therefore, a person may attain continuing status within the meaning of the Teacher Tenure Act if such person serves under contract for three years and is re-employed for the fourth year. It is immaterial which position such person serves in during those three years, as the position to which that person acquires continuing service is the position for which said person is employed for the fourth year.

Therefore, in answer to your specific inquiry, I am of the opinion that the teacher described in your request did obtain tenure as a principal upon being employed in that position subsequent to attaining continuing status as a teacher. To hold otherwise would be to emasculate the very intent and purposes of the Teacher Tenure Act. In this regard I invite your attention to the following statement made by Justice Gardner in his opinion in the case of **Board of Education of Marshall County v. Baugh**, 240 Ala. 391, 199 So. 822:

> "The very laudable purpose of this Act (referring to the Teacher Tenure Act) was to insure to the teachers some measure of security in their important work and to free them, at least to a measurable extent, from the 'vicissitudes of politics' or the likes or dislikes of those charged with the administration of school affairs."

In answer to your second inquiry regarding the amount of compensation due said teacher described in your request, I invite your attention to a recent ruling of this office found in Quarterly Report of Attorney General, Vol. 52, page 96, in which this office held that where a teacher on continuing service status is transferred, she must be transferred to a like position, school or grade, and such teacher's salary is governed by the provisions of Title 52, Section 354, Code of Alabama 1940.

A copy of the above mentioned opinion is enclosed for your information and guidance.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 2, 1949.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Department of Corrections and Institutions—Appropriations.

1. The unencumbered balance at the end of the fiscal year of the specific sum ($471,000) appropriated by the General Appropriation Bill of 1947 (Act No. 320, General Acts 1947, page 183) to the Department of Corrections and Institutions, reverts to the General Fund.

2. The unencumbered balance at the end of the fiscal year of the fund consisting of receipts by said department, and which were appropriated by the General Appropriation Bill of 1947, reverts to the General Fund.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of January 14, 1949, is as follows:

"There is a question in the minds of the State Comptroller, the Department of Corrections & Institutions, and this Department, concerning the meaning of the following statutes.

"General Appropriation Bill, Act #320, approved August 15, 1947, covering appropriations for the two fiscal years ending September 30, 1948 and September 30, 1949, provides appropriations for the Department of Corrections and Institutions as follows:

" 'For the administration, operation and maintenance of the convict system and for the payment of criminal court cost. (This appropriation is in addition to other appropriations herein provided) . . . . . $471,000.00.

" 'For the salary of the Director of Corrections and Institutions, for other salaries and for other expenses incident to the operation and maintenance of the convict system of Alabama, all receipts from its administration and from labor of the convicts and in addition thereto certain sums as shall be needed for the proper administration and maintenance of the convict system of Alabama from general fund appropriations.'

"Section 5 of this Act reads:

" 'That the appropriations herein made, except appropriations to eleemosynary institutions and the Alabama Institute for Deaf and Blind, are and shall be subject to the terms, conditions, provisions and limitations of the Budget and Financial Control Act.'

"The Budget and Control Act, Act #144, March 16, 1939, as amended, contains as Section 11 the following:

" 'All unencumbered balances of all appropriations shall revert to the State Treasury at the end of each fiscal year and to the credit of the General Fund, or the special fund from which the appropriation or appropriations were made.'

"From the above it seems that the revenue of the department is in two categories, i.e., the definite appropriation of $471,000.00 and the additional appropriation of all receipts from its administration and from labor of the convicts.

"We would appreciate your official opinion in answer to the following questions:

"1. Should not the specific appropriation of $471,000.00 be added to the appropriation of 'all receipts from its administration and from labor of the convicts,' and any unencumbered balance remaining at the end of the fiscal year be subject to reversion?

"2. If the unencumbered balance is to be reverted, should the amount revert to the General Fund of the State, or are the funds of the Department of Corrections and Institutions regarded as a 'special fund,' as mentioned in Section 11 of Act #144, March 16, 1939, thus eliminating the necessity of any reversion?

"3. If the specific appropriation of $471,000.00 is the only appropriation subject to reversion does the provision 'for the administration, operation and maintenance of the convict system and for the payment of criminal court cost,' permit salaries of the director and other salaries to be paid from this appropriation?

"4. In determining the 'unencumbered balances,' would a record of daily accumulation of purchase order commitments, carried by both the State Comptroller and the department (and which does not include requisitions) be legally sufficient to constitute encumbrances upon which to base any amount to be reverted?

"In considering the above, we respectfully call your attention to a supreme court decision, 229 Alabama 2, Abramson, et al., v. Hard, Comptroller.

"In this decision does the reference to the 'convict system' on page 6 of this decision specifically allude to reversion of unencumbered balances (Section 22 of the original budget and control act, Act 37, September 27, 1932), or is this decision confined only to Sections 19, 20 and 21 of this Act?"

The General Appropriation Act of 1947 (Act No. 320, General Acts 1947, page 183) appropriates from the General Fund the amount of $471,000 to the Department of Corrections and Institutions for the administration, operation and maintenance of the convict system and for the payment of criminal court costs. Section 5 of said General Appropriation Bill reads as follows:

"That the appropriations herein made, except appropriations to eleemosynary institutions and to the Alabama Institute for Deaf and Blind, are and shall be subject to the terms, conditions, provisions, and limitations of the Budget and Financial Control Act."

The above-quoted statutory provision specifically provides that such an appropriation as hereinabove described shall be subject to the provisions of the Budget and Financial Control Act. Said act is now found at Title 55, Sections 92 through 107, Code of Alabama 1940, as amended. Section 104 of said Title provides as follows:

"All unencumbered balances of all appropriations shall revert to the state treasury at the end of each fiscal year and to the credit of the general fund or the special fund from which the appropriation or appropriations were made."

Since the above described appropriation is subject to the provisions of the Budget and Financial Control Act, the unencumbered balance in said appropriated fund is subject to reversion in accordance with Title 55, Section 104, supra, to the General Fund from whence it was appropriated.

The General Appropriation Bill of 1947, supra, provides for another appropriation for the Department of Corrections and Institutions. Said provision reads as follows:

"For the salary of the Director of Corrections and Institutions, for other salaries, and for other expenses incident to the operation and maintenance of the convict system of Alabama, all receipts from its administration and from labor of the convicts, and in addition thereto such sum as shall be needed for the proper administration, operation and maintenance of the convict system of Alabama from general fund appropriations."

It is to be noted at the very outset that the above appropriation is not one from a "special fund," rather, it is an appropriation of the

earnings, or receipts, of the administration of said department. Title 45, Section 3, Code of Alabama 1940, is the statutory provision authorizing said department to sell, distribute, process, or otherwise dispose of all farm products, livestock, goods or wares made or manufactured by use of labor or machinery under the department's supervision.

Act No. 504, General Acts 1943, page 479, now found in Title 45, Section 105, Code of Alabama 1940, as amended authorizes the Director of the Department of Corrections and Institutions to hire or lease convicts to other state departments or agencies at such prices as may be mutually agreed upon. Your attention is invited to the fact that neither of these two statutory provisions which provide for the receipts of monies by said department mention or provide in any way that said receipts shall be kept in a "special fund." In fact, there is no statutory provision which establishes a "special fund" for the Department of Corrections and Institutions. As a matter of proper accounting procedure, such receipts are earmarked as a special fund, but this is merely for accounting purposes. Thus, the receipts of said department are available during the fiscal year for the exclusive purpose for which they were appropriated. See the case of Abramson v. Hard, 229 Ala. 3, (6), 155 So. 590, where the Supreme Court of Alabama held that such receipts were not subject to proration.

However, I am of the opinion that should there be an unencumbered balance in said fund at the end of the fiscal year, then such balance would revert to the **General Fund,** and not to a "special fund," as no special fund has been created. Such fund is distinguishable from the "Oil and Gas Fund," which is a **specific fund,** and was so considered as such in a recent opinion of this office. Quarterly Report of Attorney General, Vol. 35, page 98. The holding of this office in that opinion is as follows:

> "The statute providing for the reversion of certain funds is set forth in Title 55, Section 104, Code of Alabama 1940, which Section is in pertinent part as follows:
>
> > " 'All unencumbered balances of all appropriations shall revert to the state treasury at the end of each fiscal year and to the credit of the general fund or the special fund from which the appropriation or appropriations were made. * * *'
>
> "The 'Oil and Gas Fund' was created by Act No. 645, General Acts of Alabama of 1939, page 1009, and consists of the proceeds from the levy of two per cent on the gross casinghead value of the crude petroleum oil or natural gas produced in the State of Alabama, which levy is made under Section 13.2 of said Act. Section 13.8 of the Act establishes the fund and prescribes the manner in which it may be expended as follows:

" 'Section 13.8. All moneys to collected shall be paid into the State Treasury and there kept separate from other State funds in a fund to be known as the "Oil and Gas Fund." Such "Oil and Gas Fund" shall be expended by the Oil and Gas Supervisor, with the approval of the Governor, only for effectuating the purpose of this Act.'

"In as much as this levy of two per cent is collected and placed into the 'Oil and Gas Fund' for the sole purpose of defraying the expenses connected with the administration and enforcement of said Act No. 645, it is my opinion that it is not such an appropriation as is contemplated by the provisions of Title 55, Section 104, Code of Alabama 1940, supra, and, therefore, the balance remaining in said fund at the end of the fiscal year does not revert to the general fund of the State."

It is to be noted that the statutory provision which created that fund specifically did so by stating that "all moneys collected shall be paid into the State Treasury and there kept separate from other State funds in a fund to be known as the 'Oil and Gas Fund.' "

As heretofore stated, there is no such similar statutory provision in regard to the establishment of a "special fund" for the State Department of Corrections and Institutions. Therefore, such fund of said department cannot be considered as a **special fund**, and thus, the unencumbered balance in said fund shall revert to the **General Fund** pursuant to the provisions of Title 55, Section 104, Code of Alabama 1940.

Your fourth inquiry is answered by a former opinion of this office addressed to your department which is found in Quarterly Report of Attorney General, Volume 42, page 23. It was held in that opinion that where, prior to the end of its fiscal year, the State Board for Registration of Architects filed requisitions for purchases with the State Comptroller, such funds had been encumbered although purchase orders based on such requisitions were not issued until after the end of the fiscal year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 2, 1949.

Hon. E. O. Howell,
Sheriff, Talladega County,
Talladega, Alabama.

Counties—Sheriffs—Acts—Expenses—Talladega County.

1. Under Act No. 198, Local Acts 1945, page 106, a necessary expense for the deputy sheriff would be an expense that the sheriff himself would have necessarily incurred, had he performed the same duty personally.

2. Under Act No. 198, Local Acts 1945, page 106, the operation and maintenance of an automobile is a necessary expense.

3. Under Act No. 198, Local Acts 1945, page 106, in the sense that all duly authorized expenses of the county must be paid, the word "authorized" may be said to be mandatory.

4. Under Act No. 198, Local Acts 1945, page 106, the Sheriff of Talladega County may be reimbursed for the necessary expenses incurred for a deputy sheriff at Sylacauga.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of March 11, 1949, is as follows:

"Act No. 198, Local Acts 1945, page 106, is as follows:

" 'Section 1. The Sheriff of Talladega County, Alabama, is hereby provided a deputy sheriff, in addition to the deputies now provided him by law, who shall maintain an office in Sylacauga, Alabama. The deputy sheriff shall be appointed by the Sheriff of Talladega County, shall perform such duties as are assigned him by the Sheriff, and shall hold office at the pleasure of the Sheriff. The governing body of Talladega County shall determine the salary of the deputy sheriff herein provided for.

" 'Section 2. The governing body of Talladega County is hereby authorized to pay from the general funds of the County the salary of the deputy sheriff and necessary expenses incurred by him in performing the duties of his office. The governing body further is authorized to pay from the general funds of the county such expenses as it may deem necessary to provide for the operation, equipment, and maintenance of the office of the deputy sheriff in Sylacauga, Alabama.

" 'Section 3. This act shall take effect upon its passage and approval by the Governor.

" 'Approved June 23, 1945.'

"1. What in your opinion constitutes necessary expense in performing the duties of a deputy sheriff? (a) Would you deem the operation and maintenance of an automobile necessary expense? (b) Is the word 'authorized' as used in the above paragraph of Section 2, 'mandatory' or is it 'permissive'?

"2. Should I be reimbursed for the necessary expenses which have incurred for the deputy sheriff of Sylacauga since I have been in office, January 20, 1947?

"Through negligence of someone this bill has never been enforced in Talladega County. Therefore, when I entered office as sheriff January 20, 1947, and being in ignorance of said bill, I immediately placed a deputy sheriff in Sylacauga at my own expense, and have maintained an office there to this date. The County pays the rent of the office and the telephone bill, this being the extent of their expenses in Sylacauga for the Sheriff.

"Your prompt attention in expediting this request will be greatly appreciated."

In answer to question I, it has been held that a deputy sheriff is the deputy of the sheriff—one appointed to act ordinarily for the sheriff and not in his own name, person, or right. 57 C. J. 731, Section 4.

"A deputy sheriff is a general agent for the sheriff, and in many respects has power coextensive with those of the sheriff." **Ward v. State ex rel. Goldsmith**, 17 Ala. App. 170, 82 So. 660, certiorari denied 203 Ala. 306, 82 So. 662.

As deputy or agent of the sheriff, a necessary expense for the deputy sheriff would be an expense that the sheriff himself would have necessarily incurred, had he performed the same duty personally.

In reply to question 1(a), I am of the opinion that under the local statute, Act No. 198, Local Acts 1945, page 106, the operation and maintenance of an automobile is a necessary expense.

In **Jones v. Buckelew**, 247 Ala. 475, 25 So. 2d 23, it was said:

"* * * * * a deputy sheriff in ferreting out crime is impliedly required by law to move about from place to place. When he is doing so for that purpose, he is discharging a duty required by law. * * * * *."

"If he is using a car furnished by the county for the purpose of going to the place where he has reason to believe information as to a crime is available, and he is proceeding there to acquire that information, he is 'ferreting out (a) crime' in doing so. The

car he was driving was the instrumentality provided for the purpose of discharging his duty to acquire that information. In using it for that purpose he was performing a duty imposed by law. * * * * *"

In answer to question 1(b), I am of the opinion that the word "authorized" as used in Section 2 of Act No. 198, supra, was meant to give the governing body of Talladega County the authority necessary to meet the expenses outlined in the act. In the sense that all duly authorized legal expenses of the county must be paid by the governing body of the county, the word "authorized" may be said to be mandatory. However, I do not believe that it was the intent of the legislature to create a preferred claim or to give any special or new status to the liabilities incurred under this act.

Basing my opinion on the facts stated, supra, I am of the opinion, in answer to question 2, that you may be reimbursed for the necessary expenses which you have incurred for the Deputy Sheriff in Sylacauga. By the terms of the act, however, you will note that in the operation, equipping and maintaining of the Sylacauga office, the county governing body determines what expenses are necessary.

You are cautioned that by Title 12, Section 118, Code of Alabama 1940, claims must be presented to the county governing body within twelve months from the time they become payable, unless they are fixed by law. However, by the provisions of Title 12, Section 110, Code of Alabama 1940, the county may pay certain equitable claims, if the county governing body so determines. For a discussion of the application of these two statutes, see Quarterly Report of Attorney General, Vol. 50, page 204; Quarterly Report of Attorney General, Vol. 35, page 15; Quarterly Report of Attorney General, Vol. 27, page 41; Quarterly Report of Attorney General, Vol. 26, page 134; Quarterly Report of Attorney General, Vol. 18, page 81; Quarterly Report of Attorney General, Vol. 16, page 296; Quarterly Report of Attorney General, Vol. 15, page 62; Quarterly Report of Attorney General, Vol. 14, pages 123, 142, 144 and 304; and Quarterly Report of Attorney General, Vol. 10, page 133.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 2, 1949.

Hon. T. R. Ward,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Filing Tax—Probate Judge—Leases.

The amount of the filing tax of a lease must be determined by the probate judge.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of December 15, 1948, is as follows:

"I enclose herewith for your inspection and return a Lease from Marianna Peanut Company to New York Terminal Warehouse Company.

"From my own personal knowledge I know that the premises mentioned in this lease prior to the execution of the lease were renting for $3,000.00 per year. I therefore, disregarded the nominal consideration mentioned in the lease and figured the filing tax based on the $3,000.00 per year rental. But, in order to give them every consideration I set the total filing tax for the 4 year period at $9.00.

"A representative of the New York Terminal Warehouse Company contacted me and said that I was in error in this computation. That the lease as drawn up was merely to give them the right to issue checks in payment for the peanuts etc. He further stated that in all other counties they had been paying only $.50 Tax on like instruments.

"We have now three of these instruments for which we have not received payment. Would not record this one until the matter was attended to.

"Will you please give me an opinion as to the correct amount of filing tax on the enclosed instrument?"

In answer to your question, I will summarize briefly previous opinions of this office which interpret the filing tax statute (Title 51, Section 618, Code of Alabama 1940) and its predecessors.

It was held by this office in an opinion appearing in Biennial Report of Attorney General, 1926-28, page 183, that a lease conveys an uncon-

ditional estate in land and, therefore, conveys an interest in real property and, under the following tax law, such an instrument must pay a filing tax.

In Biennial Report of Attorney General, 1922-34, it was held that "neither the recited considerations of the conveyance nor the purpose for which it was executed determines the liability of the instrument to the tax." In other words, the rule has been laid down that the actual transaction, and not that recited in the instrument, is the true basis for determining the liability to the tax. Quarterly Report of Attorney General, Vol. 2, page 26.

In discussing the filing tax due on a long term lease, in Biennial Report of Attorney General, 1932-34, page 568, the following is stated:

> "In an opinion appearing in the Biennial Report of the Attorney General, 1926-1928, page 183, it was held that a long term lease conveyed an interest in real estate, and was subject to the filing tax dependent 'upon the cash value at the date of making such lease of the interest conveyed.' In an opinion appearing in Biennial Report 1928-30, page 538, the method of determining such present cash value was discussed and the table set out in Reiter Connolly Mfg. Co. v. Hamlin as Admr., 144 Ala. 220, was suggested, as a practical method of arriving at a fair result.
>
> "The statute makes the tax payable on the value of the property conveyed. The determination of the value is necessarily a judicial question to be determined by the Judge of Probate in a judicial capacity. In the absence of fraud or palpable mistake, I assume his find of fact is conclusive.
>
> "Applying the foregoing principles I suggest that you estimate or ascertain as best you can the total probable monthly rental and apply same method similar to the table suggested in the Hamlin case, to determine the present cash value of the interest conveyed, giving consideration to any special facts appearing in any particular case.
>
> "The last paragraph is suggested as an aid to you. The Judge of Probate is the officer charged by law with the judicial ascertainment of the value of the property conveyed." (Quarterly Report of Attorney General, Vol. 6, page 135.)

In Quarterly Report of Attorney General, Vol. 9, page 173, the following appears:

> "The Supreme Court of Alabama in Long, Judge, v. Jasper Land Company, 217 Ala. 593, 117 So. 210, 211, has held that 'The determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the Probate Judge.'

"An examination of the instrument submitted by you reveals that on its face it is merely a mortgage. It does not appear from the face of the instrument that same is a conditional sale contract. As stated in Thompson, Probate Judge v. Smith, 174 So. 796; Cert. Den. by the Supreme Court of Alabama in Thompson v. Smith, 174 So. 797, the Probate Judge 'may accept as prima facie correct the recitals of the deed (or mortgage, we interpolate) * * * and may act accordingly, in the absence of any fact or circumstances to the contrary, coming to his attention calculated to put on notice a reasonably prudent person.'

"If as you say, however, you are persuaded that the instrument submitted to you is so drawn as to avoid the payment of a tax and to disguise the real transaction, you are within your rights in ascertaining whether or not there was in a fact a sale entered into between the parties and whether or not a cash payment was made on the purchase price of the article described in the instrument offered for recordation at the time of its purchase. Having ascertained by inquiry that there was in fact a sale and there was a cash payment, it becomes your duty to govern yourself by such information in determining upon the amount of tax which is to be imposed."

In this connection, as pointed out in Biennial Report of Attorney General, 1926-28, page 682, "A million dollars worth of property can legally be conveyed for the consideration of love and affection, but the filing tax on such deed or conveyance would be based on the million dollar value." See, also, for examples and specific cases, Biennial Report of Attorney General, 1926-28, pages 42, 49, 323, 331 and 682; Biennial Report of Attorney General, 1928-30, pages 210, 673 and 683; Biennial Report of Attorney General, 1932-34, page 194; Quarterly Report of Attorney General, Vol. 1, page 66; Quarterly Report of Attorney General, Vol. 2, page 25; Quarterly Report of Attorney General, Vol. 3, page 51; Quarterly Report of Attorney General, Vol. 5, page 122; Quarterly Report of Attorney General, Vol. 7, page 243; Quarterly Report of Attorney General, Vol. 17, page 265; and Quarterly Report of Attorney General, Vol. 23, page 14.

Turning now to the lease at hand, I am of the opinion that if you, as Judge of Probate, being the officer charged by law with the judicial ascertainment of the value of the lease, determined on the facts available to you that the lease does not recite the true consideration on its face, but that the actual consideration was three thousand dollars per year, then you must base your determination of the filing tax on the actual value as determined by you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 3, 1949.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Municipalities—Officers and Offices—Judges of Probate.

Under facts stated, a member of the town council who has a financial interest in the town waterworks system during his term of office, violates Title 37, Sections 431 and 452, Code of Alabama 1940, and is subject to the penalties imposed by the penal statutes related thereto.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of March 30, 1949, is as follows:

"One of the members of the Town Council of an incorporated town of Dale County owns and operates the water works system of the town and furnishes for profit its water and fire protection. Subsequent to his acquiring this plant, the voters of the town, with full knowledge of such ownership, elected him a member of the Town Council.

"I am now asked to proceed against this man criminally, by issuing a warrant for his arrest, and putting him on trial in county court, under Sections 431 and 452, either one or both, of Title 37 of the Code of Alabama 1940.

"I desire your official opinion as to whether the sections named are applicable in his case, since the voters of the town elected him in the full knowledge of his prior ownership of such water works system.

"Your usual prompt attention will be greatly appreciated in this case."

Title 37, Section 431, Code of Alabama 1940, to which you refer, reads as follows:

"§431. Councilmen shall not hold other office, or be interested in municipal contracts.—No member of any city council shall, during the time for which he has been elected, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased during the term for which he shall have been elected. Nor shall he be interested, directly or indirectly, in any contract or

job for work or material, or the profits thereof, or services to be performed for the corporation, except as herein provided."

Title 37, Section 452, Code of Alabama 1940, also referred to, reads as follows:

"§452. Mayor and aldermen accepting employment from public service corporation vacates office.—No mayor or alderman of any municipality shall accept employment, after his election, and during his term of office, from any public service company or corporation operating under any franchise granted by the municipality, and any person accepting such employment after his election, shall constitute grounds of impeachment therefor. And any mayor or alderman, or other member of the governing body of any municipality who shall have any private or personal financial dealings with, for or on account of the municipality, except such as are imposed by his official position, or who shall render any service or do any work or supply any commodity, for financial compensation, payable out of the funds of the municipality, shall be guilty of a misdemeanor, and the doing of such act shall constitute grounds for impeachment of such person."

It is my opinion that the statutes noted are applicable under the facts as you outline them. The fact that the voters of a town elect an individual a member of a town council with full knowledge of his ownership of the waterworks system of the town, in no manner circumvents the objectives of the statutes. These objectives are directed toward a stabilization of public policy in this state which appear to be clearly elucidated upon in the case of **Mayor and Aldermen of the City of Ensley v. Hollingsworth & Co.**, 170 Ala. 396, 54 So. 95. We quote from the opinion of the Supreme Court of Alabama in this case as follows:

" * * His office and duty were public, and his relations to the municipality in regard to the matter of the contract were in the highest sense of a fiduciary nature. He occupied a position, which in the making of the contract brought in conflict his private, personal interests with his public duty. It would be but natural for him as an individual to be prompted by self-interest to obtain a contract most favorable to himself. On the other hand, it was his duty as a public officer to act with sole regard to the public interests. It is a case where self-interest and public duty are directly opposed. Such contracts are forbidden by public policy. * * * *."

It is not the fact that an individual, with the knowledge of the voters, might own a waterworks system at the time he was a candidate for councilman, but the fact that he was elected and officially entered into activities of his office while still owning the waterworks system, that is the essence of the matter. Such an individual could divest himself of all connection with such a waterworks system before officially assuming the duties of his office and thus could legally hold office as a councilman. It is my opinion that statutory violation would occur at the moment

such an individual, having previously failed to divest himself of all connection with the waterworks system of the town, were to enter upon his official duties as councilman.

You state that you are asked to proceed against such an individual criminally. It appears to me that this is a matter that should be referred to the Circuit Solicitor of your judicial circuit for proper investigation of the facts. It would thereupon devolve upon the Circuit Solicitor to take such action as the case calls for. I therefore refer you to the Honorable A. S. Borders, Circuit Solicitor of the Third Judicial Circuit, Clayton, Alabama, for further consideration of the above stated matter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 4, 1949.

Hon. Bradley Brown,
State and County License Inspector,
Jefferson County,
418 Courthouse,

Birmingham 3, Alabama.

Licenses — Manufacturing Plants — The liability of certain plants for license under Title 51, Section 499, Code of Alabama 1940, discussed.

The amount of license imposed by this schedule should be measured by the total amount of capital employed in the business, as shown by the taxpayer's books at the time the application for license is made.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of May 12, 1948, is as follows:

"This office is having considerable difficulty in determining the liability for a license under Section 499, Title 51, as amended in 1947, as it applies to various types of business. You will note that the language is confusing in this amended Section. In one instance it reads:

"'. . . . all mills manufacturing any finished or semi-finished products of . . . .'

"and further on in the Schedule:

"'. . . . or other factory where materials are woven, made or assembled . . . .'

"So that we may enforce the provisions of this Section as they were intended, I would appreciate an official opinion from you on the following specific instances.

"1. Candy manufacturers, who assemble several materials—I understand in some instances 'cellulose' is one of them—from which the finished product is made.

"2. Printing shop or publisher, who uses paper, and by printing thereon, makes a finished product either in the form of printed material for office use or as a periodical.

"3. A bakery, where grain which has been manufactured into a flour is assembled with other materials and made into a finished product.

"4. A tailor shop, where a suit of clothes is made to specifications, the material used being selected by the purchaser from bolt goods.

"5. A potato chip manufacturer, manufacturer of mayonnaise, salad dressing, sausage, or other food products where ingredients are assembled and made into a finished product, a manufacturer of cosmetics, perfumes, etc., or a dental laboratory that uses, among other things, gold alloys, wax, and methacrylate.

"6. Sign shops, where sheet iron, braced with angle iron, is used to manufacture a sign, which is then painted to specifications. In some instances, heavy paper is used for a less durable sign.

"7. Flower shop, which uses an iron frame or easel and attaches thereto with wire fresh cut flowers, and in some instances artificial flowers or ornaments, and makes a finished design or wreath.

"8. A plant, where sand is mixed with lime putty and shipped to the contractor, who adds cement which results in mortar.

"9. A plant, where cement, slag, and sand are mixed with water and sold directly to the contractor or builder to be used in construction work.

"10. A contractor, who operates an asphalt mixing plant which mixes asphalt, sand, and other materials going into asphalt, and who

does not sell this mixed product but uses it in the performance of contracts he accepts.

"11. A plant, the operation of which consists of taking raw cinders obtained from the steel operations and crushing them to a specific size, to be used in making concrete blocks.

"12. A paint manufacturers, where oil, along with resin, coloring, etc., are assembled and mixed to make paint products.

"13. A plant which purchases steel rods and, without changing their contents in any way, cuts and bends the rods into various sizes suitable for reinforcements in construction work.

"In setting forth the basis for the license fee under this Section, the following language is used:

" '. . . . where the investment for plant, equipment, supplies, and fixtures . . . .'

"At the end of Section 499, as amended, it reads:

" 'Provided that such investment shall be the total capital employed in such plant'

"I am of the opinion that these two definitions of the amount on which to base the license fee are so different that a definite method for determining the basis of the license should be interpreted by you in the form of an official opinion.

"For example, if total capital employed is to be used in determining the license, does this mean net worth alone, or does it mean net worth plus borrowed capital? It is obvious that in many cases there could be a wide difference between 'the investment for plant, equipment, supplies and fixtures,' and 'total capital employed.' 'Total capital employed' apparently includes working capital, whereas 'investment for plant, equipment, supplies and fixtures' excludes working capital.

"Another indefinite part of the Statute is that no date is specified for the statement to be taken from the books of the company. I might point out that in many instances equipment used in plants liable under this schedule have been depreciated on their books over a period of years until their book value now is practically nil. Should their book value, assessment valuation, or replacement cost be used as a basis on equipment?

"Unless we are favored with a comprehensive definition to use in determining a basis for the license, it will be most difficult to

fairly and equitably enforce the provisions of this Act."

Before answering your questions, I wish to call your attention to the following:

In 27 Words and Phrases (Per. Ed.), Mill, 186, it is said:

"The term 'mill,' in modern usage, includes various machines or combinations of machinery, as cotton mills, fulling mills, powder mills, etc., to some of which the term 'manufactory' or 'factory' is also applied.

* * * * * *

"A 'mill,' as defined by Webster, has two significations: (1) 'A complicated engine or machine for grinding and reducing to small particles grain fruit, or other substance, or for performing other operations by means of wheels and a circular motion, as a grist-mill for grain, a coffee mill, a cider mill, a barkmill. The word is now extended to engines or machines moved by water, wind, or steam, for carrying on many other purposes.' (2) 'The house or building that contains the machinery for grinding.'"

In 16 Words and Phrases (Per. Ed.), Factory, 31, the word "factory" is defined as follows:

"In the English law a factory includes all buildings or premises wherein or within the close or curtilage of which steam, water, or any mechanical power is used to work any machinery employed in preparing, manufacturing, or finishing cotton, wool, hair, silk, hemp, or tow. Later this definition was extended to other manufacturing places. The American legal definition of the word is practically the same; its meaning not being confined to such enterprises as use machinery and mechanical power, but being properly applied to enterprises using no machinery of any sort, such, for instance, as cigar factories, or factories where garments are made."

In **Curry v. Alabama Power Co.**, 243 Ala. 53, 8 So. 2d 521, the Court said:

"The word 'manufacture' means the making of anything by hand or artifice. Louisville & N. R. Co. v. Fulgham, 91 Ala. 555, 8 So. 803. Mr. Worcester's Dictionary defines 'manufacture' as 'the process of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery.' The definition that the word is given by the Century Dictionary is as follows: 'The production of articles for use from raw or prepared materials by giving these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery.' According to the above definitions of the word 'manufacture,' we are constrained to consider

and declare an electric light company a manufacturing corporation to all intents and purposes. * * *."

Title 51, Section 499, Code of Alabama 1940, as amended by Act No. 136, General Acts 1947, page 44, approved July 18, 1947, provides as follows:

"§499. Cotton seed oil mills, cotton mills, factories, etc.—Every person operating a cotton seed oil, mill, cotton mill, cloth mill, towel factory, garment factory, yarn mill, hosiery mill, peanut mill, peanut oil mill, peanut shelling plant, paper mill, pulp mill, mill manufacturing sheeting rugs, bags, hats, cement, carpets, lime, plaster, soap, chemical, acid (other than fertilizer) explosive and all mills manufacturing any finished or semi-finished products of tobacco, thread, yarn, cloth, fur, felt, nylon, paper, jute, rubber, iron, iron ore, copper, brass, tin, coal, coke, sand, cement, glass, clay, slag, aluminum, bauxite, ore, grain, other than what is commonly called a grist mill, oats, corn, rye, synthetic rubber, stone, oil, crude oil, tar, resin, asphalt, parafin, plastics, fibers, straw, cellulose, or other factory where materials are woven, made or assembled: Ten dollars where the investment for plant, equipment, supplies and fixtures is less than fifteen thousand dollars; twenty dollars where the investment for plant, equipment, supplies and fixtures is fifteen thousand dollars and less than twenty-five thousand dollars; thirty dollars where the investment for plant, equipment, supplies and fixtures is twenty-five thousand dollars and less than fifty thousand dollars; fifty dollars where the investment for plant, equipment, supplies and fixtures is fifty thousand dollars and less than one hundred thousand dollars; one hundred dollars where the investment for plant, equipment, supplies and fixtures is one hundred thousand dollars and less than five hundred thousand dollars; one hundred and fifty dollars where the investment for plant, equipment, supplies and fixtures is five hundred thousand dollars and less than one million dollars; two hundred dollars where the investment for plant, equipment, supplies and fixtures is one million dollars and over. Provided that such investment shall be the total capital employed in such plant and the person applying for such license shall furnish a sworn statement showing the amount of the investment and accompany the same with a statement taken from the books of the company, showing the amount of such investment and such books shall at all times be subject to the inspection of the department of revenue or its agents. Provided further that the licenses levied under this section shall not apply where the factory, mill or plant which would be licensed by this section is covered by a specific license under this article."

Under the doctrine of "ejusdem generis" where particular classes of things are followed by general words, the general words are presumed to describe the particular classes previously enumerated. See **Ellasberg Bros. Mercantile Co. v. Grimes**, 204 Ala. 492, 86 So. 56; **Central of Georgia**

v. State, 145 Ala. 99, 40 So. 991; **Prim v. State,** 36 Ala. 244; **Johnson v. State,** 32 Ala. 583. See also opinion of this office found in Quarterly Report of Attorney General, Volume 1, page 129, under date of October 29, 1935 (relative to this license schedule as it appeared in the 1935 Act). In my opinion, the words "or other factory where materials are woven, made or assembled," supra, means any other factory where materials of the same kind and nature as those previously enumerated in this license schedule are woven, made or assembled.

This license statute is a penal statute and must be strictly constructed and cannot be extended to cases not included in the clear import of its language. See **Dumas v. State,** 17 Ala. App. 492, 86 So. 162.

In answering your first question, it is my opinion that a candy manufacturer does not come within the purview of this license schedule. Candy is not expressly mentioned in the license schedule and it cannot be said to be of the same kind or nature as the enumerated classes of factories or mills.

To properly answer your second question, it would be necessary for me to have the detailed facts about the operation of each shop or publisher. However, I wish to call your attention to the case of **Rowe Co. v. State Tax Commission,** 131 Atl. 509, 149 Md. 251, in which case the court said:

> " 'A publisher may be a manufacturer or he may not, accordingly as he does or does not manufacture the books, magazines, or other printed matter which he publishes. But the mere fact that he is a publisher does not compel the inference that he is a manufacturer, but the character of the work done in the operation of his publishing business does. So that, while the appellant may be properly classified as a publisher, that fact alone is not sufficient to characterize his business as manufacturing, for that must be determined, not by the name given the business, but by the character of the work done in the course of its operation.' "

In the case of **Commonwealth v. Peerless Paper Specialty, Inc.,** 344 Pac. 283, 25 A (2) 323, the Supreme Court of Pennsylvania in 1942 held that one engaged in business of converting paper into adhesive paper, sealing tape and kindred products by use of special machinery and special care, skill and labor in blending glues and applying adhesive substance to paper was a manufacturer within the exemption provision of the mercantile license tax act.

In the case of **State Tax Commission v. Standard Oil Co.,** 31 A (2) 621, 181 Md. 637, the Court of Appeals of Maryland, in 1943, held that a job printing plant was engaged in manufacturing articles of commerce and was entitled to a manufacturer's exemption from taxation.

In answering your third question, it is my opinion that a bakery comes within the purview of this license schedule. A bakery uses flour,

a product of grain, and adds other ingredients to make many finished products, such as bread, rolls, cakes, and biscuits.

In the case of **Commonwealth v. Snyder's Bakery**, 35 A (2) 260, 348 Penn. 308, the Supreme Court of Pennsylvania, in 1944, held that a bakery in making potato chips was engaged in manufacturing within the act exempting manufacturers from the mercantile license tax. See also the case of **State v. Hennessy Co.**, 230 Pac. 64, 71 Mont. 301, which held that a bakery was a manufacturing plant.

In answer to your fourth question, it is my opinion that this tailor shop does not come within the purview of this license schedule. See 10 A. L. R., page 1291, and authorities cited therein, which hold that making clothing to measure does not constitute manufacturing. See also opinion of this office to Honorable W. L. Parrish, Judge of Probate, Chilton County, under date of July 27, 1948, a copy of which is enclosed for your own convenience, which holds that the term "mill," under this license schedule, connotes the use of machinery in the process of manufacturing, and does not cover the mixing by hand of cement which is allowed to set in molds.

In answering your fifth question, it is my opinion that none of the manufacturers as enumerated in this question come within the purview of this license schedule. By the law of ejusdem generis, these manufacturers cannot be said to be of the same kind or class as the ones previously enumerated in the license schedule.

In answering your sixth and seventh questions, it is my opinion that the sign shop and flower shop do not come within this section. See opinion of this office to Honorable W. L. Parrish, Probate Judge of Chilton County, supra.

In my opinion, the plant mentioned in your eighth question comes within the purview of this license schedule. Sand is specifically enumerated in the license schedule.

In answering your ninth question, it is my opinion that this plant comes within the license schedule, as cement, slag and sand are specifically mentioned in the schedule.

In answering your tenth question, in my opinion, this asphalt mixing plant does not come within the purview of this license schedule. This plant is incidental to the contracting business. There are a number of methods that the contractor might use in mixing the asphalt which are incidental to carrying on his business as a contractor.

In answering your eleventh question, this plant comes within this license schedule. In my judgment, cinders are similar to slag and, therefore, by the law of ejusdem generis, come within this schedule.

Machinery employed in a rock quarry for the purpose of preparing and delivering the rock for use as road material in **Commonwealth for Use of Rockcastle County v. W. J. Sparks Co.** (1928), 222 Ky. 606, 1 S. W. (2) 1050, was held to be exempt from taxation under a statutory provision excepting from taxation machinery engaged in manufacturing. In this case, the court said:

> "If this were a case where the rock was merely blasted from the quarry and then broken into sizes for convenience of delivery, a different question would be presented * * *. By the process in question its shape, size and adaptability are essentially changed, and the native rock is converted into an article suitable for use as road material."

In answering your twelfth question, in my opinion, this paint manufacturer does not come within the purview of this license schedule.

In answering your thirteenth question, in my opinion, this plant would come within the purview of this license schedule, as it is processing steel rods which are a product of iron or iron ore.

In **David J. Joseph Co. v. Ashland,** 223 Ky. 203, 3 S. W. (2) 218, the court held that machinery used in cutting up scrap iron into smaller pieces of uniform size and shape was exempt from taxation as manufacturing machinery. See also **Baltimore v. State Tax Commission,** 161 Md. 234, 155 A 739.

In answering the second part of your request, I wish to call your attention to an opinion of this office to Honorable H. G. Dowling, Commissioner of Revenue, under date of February 29, 1944, found in Quarterly Report of Attorney General, Volume 34, page 41. This opinion was construing the license schedule, Section 499, before the 1947 amendment. I wish to quote from this opinion as follows:

> "I am of opinion, therefore, that it is immaterial whether the license owns or holds in fee simple or leases merely the land or site and improvements thereon, where it does business. In any case the only measure for determining the amount of license to be paid is the amount shown by the books to be invested in tangible fixed assets or capital, whether represented by land, buildings, machinery, or equipment or all of them, or some of them, used in carrying on the business, plus the amount invested in supplies at the time application for license is made.
>
> "Thus it will be seen that the fact that in this particular instance the taxpayer leases the premises where he does business should not be considered. The amount of license it should pay will have to be determined solely from its own books of account."

The term "capital" means, not the capital stock, but the actual property or estate of the corporation, whether in money or in property. **See State v. Becker,** 8 S. W. (2) 970, 32 Mo. 908.

In my opinion, the words "total capital employed" means all the capital actually invested or used in the business without regard to form. It may be invested in plant, land, building, machinery, supplies or working capital.

In the case of **State v. Burchfield Bros.,** 211 Ala. 30, 99 So. 198, the Supreme Court said:

> "These words ('capital actually employed') were used in subsection (d), section 5, of the statute, supra, in their natural and ordinary signification and in the generally accepted sense. They have application to all of the properties and moneys set apart from other uses and invested or employed in the operation of the business with a view to income or profit therefrom. * * *"

From the above, it is my opinion that the proper test for you to use in determining this license is to compute the total amount of capital employed in the business as shown by the taxpayer's books at the time the application for the license is made.

You are not interested in the net worth of the concern. Your inquiry should be limited to the total amount of capital employed in this particular business.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 5, 1949.

Hon. Sam H. Oliver, Mayor,
City of LaFayette,
Chambers County,
LaFayette, Alabama.

Motor Carriers—Municipalities—Taxation.

1. Title 37, Section 746, Code of Alabama 1940, has been superseded by Section 31 of Act No. 669, General Acts 1939, page 1064, approved July 5, 1940.

2. Under Section 31 of Act No. 669, General Acts 1939, page 1064, approved July 5, 1940, a municipality does not have authority to levy a license tax on a motor carrier which delivers

gasoline from another point in Alabama to a point within the jurisdiction of said municipality.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of March 25, 1949, is as follows:

"This is to request an official opinion of the right of the City of LaFayette to levy a license tax against common carriers of property for hire, under the following facts:

"1. A common carrier of property for hire holding a Certifi-fate of Public Convenience & Necessity makes deliveries of gasoline to a gasoline distributor who maintains a plant within the police jurisdiction of the City of LaFayette. The common carrier maintains no terminal facilities or office within the City or its police jurisdiction; solicits no orders and transacts no business within the City or its police jurisdiction, other than the deliveries to the gasoline distributor. Title 37, Sec. 746, Code of Alabama of 1940 gives the City the right by proper ordinance to levy and collect reasonable privilege and license taxes from all motor propelled common carriers where such common carriers do business in the City by maintaining depots, stations, or terminal facilities therein or by receiving passengers or freight for transportation for hire from said City or town to another point in Alabama, or from other points in Alabama to said city or town. Does this statute permit the levying of such license tax where no depots, stations or terminal facilities are maintained therein but property is delivered within said City from other points in Alabama?

"2. To what extent has Title 37, Sec. 746 been repealed or superseded by the Alabama Motor Carrier Act of 1939 and particularly Title 48, Sec. 301(31)?

"3. Under Title 48, Sec. 301(31) does the City of LaFayette have the right to levy a license tax against a motor carrier where the motor carrier does not receive passengers or freight for transportation for hire between said City and town and other points in Alabama but does in some other city or town receive freight or transportation for hire into the City of LaFayette?"

Title 37, Section 746, Code of Alabama 1940, to which you refer in your letter requesting an official opinion, has been completely superseded by Section 31 of Act No. 669, General Acts 1939, page 1064, approved July 5, 1940. This legislative enactment is commonly referred to as "The Alabama Motor Carrier Act of 1939," and Section 31 thereof reads as follows:

"MUNICIPALITIES. Any incorporated city or town in this State shall have the right by proper ordinance to tax and collect reasonable privilege license or taxes from any motor bus terminal, or any person operating any terminal or station facilities for transportation of passengers, property or express, transported by motor carriers, **and any motor carrier as defined by this Act where such motor carrier does business in said city or town by receiving passengers or freight for transportation for hire between said city or town and another point in Alabama,** provided, however, that said privilege license or tax shall not exceed the sum of $25.00 in incorporated cities or towns of less than 5,000 inhabitants, **and that** said privilege license or tax shall not exceed the sum of $100.00 in incorporated cities or town of over 5,000 and less than 25,000 inhabitants; and that said privilege license or tax shall not exceed the sum of $200.00 in incorporated cities or towns of more than 25,000 and less than one hundred thousand inhabitants; and that said privilege license or tax shall not exceed the sum of $300.00 in incorporated cities or towns of over one hundred thousand inhabitants; and that the population shall be computed on the federal census of 1930 or any subsequent decennial federal census; and provided further that said privilege license or tax shall, in cases of motor buses, include the privilege of receiving and discharging both passengers and express." (Emphasis supplied.)

From a reading of this statute you will observe that the Legislature specifically omitted the phraseology contained in Title 37, Section 746, to-wit, "or from other points in Alabama to said city or town."

Noting this change in our Alabama Motor Carrier Act of 1939, the Alabama Supreme Court held in the case of **Decatur Transit v. Gadsden,** 249 Ala. 314, 31 So. 2d 339, as follows:

"By omission from this section of the words 'or from other points in Alabama to said city or town,' which appeared in Title 37, Section 746, the legislative intent was to withhold the authority for the city to levy a license tax upon common or contract carriers who do no more than come into the city and deliver their goods.
* * * * *

"This act was intended as a revision of the entire subject."

In view of the above authority, the three questions that you pose are categorically answered as follows:

1. No.

2. Title 37, Section 746, Code of Alabama 1940, has been completely superseded by Section 31 of the Alabama Motor Carrier Act of 1939. (Act No. 669, General Acts 1939, page 1064, approved July 5, 1940.)

3. No.

You are herewith advised accordingly.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 5, 1949.

Hon. Robert Burleson,
Attorney, Town of Haleyville,
Winston County,
Haleyville, Alabama.

Municipalities—Taxation—Gasoline.

1. A municipal ordinance requiring a license of every wholesale distributor, seller or dealer of gasoline, the amount of said license being the sum and amount equal to ¼ cent on each and every gallon sold or distributed by such wholesale distributor, seller or dealer is an excise tax levied on such wholesale distributor, seller or dealer for the privilege of doing such business.

2. An excise tax levied on a wholesale distributor, seller or dealer of gasoline by a municipality is not a tax levied on the purchasers of gasoline from such wholesale distributor, seller or dealer even though such purchasers bear the burden of the tax in view of the fact that the price of each gallon of gasoline includes an amount equal to the tax.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of April 7, 1949, is as follows:

"At the present time the City of Haleyville has in operation a gasoline tax of ¼ of 1% per gallon on all the gasoline which is unloaded within the corporate limits of the city. This tax is also referred to as a 'gasoline storage tax' (attached hereto is a copy of the form used for collection, which has a copy of the city ordinance on the back).

"In this county we have an unique situation in the fact that all gasoline sold in the county is unloaded in the city limits of Haleyville, wherefore all gasoline sold to retail dealers in this county is taxed by the City of Haleyville.

"The Winston County School Board has refused to pay this tax on the grounds that a municipality cannot tax a county or any of its agencies.

"It is not the contention of this council that the City can tax a county or any of its subdivisions, however, it is our contention that we can place a tax upon the wholesale dealers in this city, who in turn actually do not collect a tax for the city, but merely raises the price of their gasoline to meet this tax.

"If your answer is in the negative as to whether or not we can collect this tax from the Winston County School Board, I would appreciate it if you would consider the following proposition:

"Would the City of Haleyville be within its legal rights to place a license on these wholesale dealers, which would amount to $100.00 per year, plus ¼ of 1% per gallon on all gasoline unloaded and stored within the limits of the City of Haleyville? (The City at present has a $100.00 license on all gasoline wholesale dealers.)

"The only difference in this proposition and our present situation is that now there is a license and a tax on the wholesale dealers, and in the above proposition there would only be a license. The amount of the privilege license paid to the city for a year will be determined by the amount of gasoline unloaded and stored within the city limits."

I assume from your inquiry that the Winston County School Board purchases all of the gasoline used by such Board from wholesale distributors, sellers, or dealers of gasoline located in the City of Haleyville and does not maintain and operate storage tanks of its own for its own use.

An ordinance imposing a license tax on a wholesale distributor, seller, or dealer of gasoline is a valid exercise of the police power of any city or town as set out in Title 37, Section 733, Code of Alabama 1940. **Birmingham v. Wilson**, 27 Ala. App. 288, 172 So. 292, and **Prichard v. Harold**, 28 Ala. App. 235, 186 So. 499.

Section 2 of ordinance number 239, City of Haleyville, Alabama, which levies the tax in question, is as follows:

"Section 2. For the remaining part of the calendar year of 1947 and each succeeding year thereafter in addition to the license now charged, every wholesale distributor seller or dealer of gasoline as above defined and who has a bulk storage tank within the City of Haleyville, Alabama, shall pay a license to the City of Haleyville, Alabama, and a license is hereby fixed and created, which license shall be the sum and amount equal to ¼ cent on each and every gallon of gasoline sold or delivered by such distributors, sellers or dealers, within the corporate limits of the City of Haleyville, Alabama, or that passes through its bulk storage plants by being delivered therein and taken therefrom for distribution or sale within or without the City of Haleyville, Alabama."

It appears from the above-quoted portion of ordinance number 239 that the gasoline tax imposed thereby is very similar to the gasoline excise tax levied by Title 51, Section 647, Code of Alabama 1940, as amended. It, therefore, follows that the judicial determinations with respect to the excise tax levied by Section 647, **supra**, and the opinions

of the Attorney General with respect to same would be applicable to the question involved in your request.

The question of whether or not a municipality may tax an agency of the county is not, in my judgment, presented by your inquiry. It is my opinion that the Winston County School Board when purchasing gasoline from a wholesale distributor, seller, or dealer in the City of Haleyville, Alabama, at a price which includes the ¼ cent per gallon license tax imposed upon such wholesale distributor, seller, or dealer by Section 2, Ordinance Number 239, **supra**, is not thereby subjected to the payment of the tax levied by said section of said ordinance but is merely paying the wholesale price of such gasoline as charged by the wholesale distributor, seller, or dealer. The tax is levied on the wholesale distributor, seller, or dealer of gasoline and not on the purchasers of such gasoline. Of course, the tax is considered in arriving at the price of each gallon of gasoline and the price will include an amount equal to the tax, but no tax is imposed by this ordinance on the purchaser.

The general rule is that when a tax levy is laid in general terms with nothing to indicate that it was intended to apply to a city or county, it will be held not to apply. **Huntsville v. Madison County,** 166 Ala. 389, 52 So. 326; **Van Brocklin v. Anderson,** 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 845. There is no infringement of this principle to hold that when a county buys gasoline from a wholesale distributor, seller, or dealer who is subject to the tax, the amount of said tax should not be deducted. The tax is imposed on the wholesale distributor, seller, or dealer and not on the county in such a transaction, though it incidentally is paid in the amount of the purchase price. **State v. City of Montgomery,** 228 Ala. 93, 151 So. 856.

That such a tax as here involved is an excise was affirmed in the case of **State v. City of Montgomery, supra.** The Court in that case held that a storer of gasoline within the terms of the Act of 1935 (General Acts 1935, Schedule 156, et seq.) is taxable for that privilege and that such a tax is not a direct property tax.

And in the case of **City of Birmingham v. State,** 233 Ala. 138, 170 So. 64, the Court said:

> "A property tax is laid upon the property, although its owner is due to pay it. The State gasoline tax in question is not laid on the property. but on the privilege of its storage, and that regardless of ownership, and the amount is measured by the gallons withdrawn from storage. The amount of the tax does not fluctuate as the price of gasoline changes.
>
> "It is an imposition upon the privilege of storing in the State a dangerous commodity not laid on the property, but on the privilege. * * * * * *"

In considering a similar question, the Supreme Court of Alabama in the case of **County Board of Education v. State**, 237 Ala. 434, 187 So. 414, said:

> "The case of State v. City of Montgomery, 228 Ala. 93, 151 So. 856, cited and approved in State Tax Commission v. Board of Education of Jefferson County, supra, contains the declaration that the privilege of storing in bulk an inflammable article, such as gasoline, within a city is the just basis for an excise tax, and as levied in the Revenue law is not a property tax; that it is immaterial to what use the gasoline so stored is subjected, when it is withdrawn from such storage in the state, it was subject to the excise tax in question. * * *
>
> " 'Since the privilege of storing is the basis of the tax, and for that purpose an excise may be levied, it is not controlled by Section 91 of the Constitution, and it is immaterial to what use it is put after it is withdrawn from storage. Crockett v. Salt Lake County, 72 Utah, 377, 270 P. 142, 60 A.L.R. 867.' * * *
>
> "It is further decided on the former appeal in the case of State Tax Commission v. Board of Education of Jefferson County, supra, that the operation of school busses on public highways is a lawful activity of the board of education; that an excise tax is a burden passed on to the consumer though the tax is levied for the privilege (in this case, the privilege of withdrawing gasoline from storage to operate school busses); * * * *"

In the case of **State Tax Commission v. County Board of Education of Jefferson County**, 235 Ala. 388, 179 So. 197, the Court said:

> "While the excise tax in this instance is levied for the privilege of 'storing' gasoline, it is common knowledge, and the manifest intent of the lawmakers, that the tax burden be passed on to the consumer * * * * *."

See also Biennial Report of Attorney General, 1934-36, page 570.

While the above authorities stand for the proposition that the tax burden resulting from Section 2 of Ordinance No. 239, supra, will be passed on to the purchasers of gasoline (the Winston County School Board as well as other purchasers), the tax is imposed on the wholesale distributors, sellers, or dealers in gasoline and not on the County School Board or other purchasers. It is, therefore, my conclusion that the Winston County School Board is not, when purchasing gasoline from wholesale distributors, sellers, or dealers in the City of Haleyville, Alabama, paying the tax levied by Section 2 of Ordinance No. 239, supra, but is only paying the purchase price for said gasoline. Therefore, the Winston

County School Board, an agency of the county, is not being taxed by the City of Haleyville, a municipality.

Since the first part of your inquiry is answered in the affirmative, consideration of your second proposition is not deemed necessary.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

May 6, 1949.

Hon. Bohdan Hallas,
Register, Circuit Court,
Walker County,
Jasper, Alabama.

Registers—Counties—Costs and Fees—Salaries—Constitutionality—Walker County.

1. A county officer cannot recover fees and commissions earned as officer and voluntarily paid into the county treasury under a statute subsequently declared to be unconstitutional.

2. Fees and commissions of a county officer which accrued during his term of office, but which were collected during his successor's term, should be paid over to the officer during whose term said fees and commissions accrued.

3. Where a county officer on a fee basis is by local act placed on a salary basis, in the event such local act subsequently is declared unconstitutional, such officer is entitled to retain any and all fees and commissions accruing during his term of office provided he does not voluntarily pay them into the county treasury.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of April 22, 1949, is as follows:

"QUESTION?

"Who is entitled to the Register's fees that have been collected and are being collected for the period of time when the register was on a salary. Register went on salary 6 July 1945, and went back

on the fee system 1 October 1948, when the Circuit Judge of Walker County Ala ruled the act placing the Register on a Salary Basis unconstitutional. This ruling never did go to a higher court.

"When the Register was on a salary basis the fees were to be collected and sent to County General Fund. (Local Act #487, in Local Acts of 1945 on page 189.) This act was declared unconstitutional. I have moneys collected from fees accrued while Register was on salary. Who gets the fees? The County or the former Register, or the present register who is collecting them.

"Would appreciate an early opinion as I am putting aside these costs and holding payment of them until I receive your opinion."

The local act involved is Act No. 487, Local Acts 1945, page 189, approved July 6, 1945, its effective date being the date of approval. This act places the Register of the Circuit Court of Walker County on a $275.00 per month salary and provides that all fees and commissions thereafter collected shall be paid into the county treasury of said county.

You state that the Circuit Judge of Walker County thereafter ruled Act No. 487, supra, unconstitutional and that such ruling was never appealed to a higher court. Whether the act was declared unconstitutional as offensive to Sections 68, 281, or 96, Constitution of Alabama 1901, or upon some other ground is immaterial for present purposes. In any event, the decision of the Circuit Court of Walker County, whether correct or erroneous, became the law of the case so far as this office is concerned. **Avery Freight Lines, Inc. v. Persons, et al.,** (Ala.), 32 So. 2d 886.

It is a settled principle of law that money voluntarily paid with knowledge of all the facts and by reason of a mistake of law cannot be recovered, in the absence of fraud, duress or extortion in some form. **H. A. Edwards Ins. Agency, et al v. Jones,** 242 Ala. 624, 7 So. 2d 567; **Curry, Commissioner of Revenue v. Johnston,** 242 Ala. 319 6 So. 2d 397; **Rice v. Tuscaloosa County,** 242 Ala. 62, 4 So. 2d 497.

Where a statute is declared unconstitutional, the effect of such declaration is that the statute was void **ab initio.** That means that, where the legal foundations of a statute crumble as the result of a court decision, the statute vanishes and all rights and liabilities must be determined in the light of the **status quo** existing prior to enactment of the statute.

It follows from **Rice v. Tuscaloosa County,** supra, that whether or not the fees and commissions involved have been paid into the county treasury, is a material inquiry. If so paid, they are not recoverable, upon the dual grounds of our State's non-claim statute (Title 12, Section 118, Code of Alabama 1940) and upon the principle of voluntary payment. **Rice v. Tuscaloosa County,** supra.

From the wording of your request, I conclude that none of the fees and commissions herein involved has been paid into the county treasury. In such case the county has no claim thereto, the act having been declared unconstitutional. You, as the present register, have no claim upon fees and commissions not accruing during your term of office.

Therefore, I answer your question by stating that the former register is entitled to such fees as accrued during his term of office, and that you are entitled to such fees as accrued during your term of office. This conclusion controls irrespective of the time of collection of such fees. It is elementary that a public officer is entitled only to such fees as accrued during his term of office and that he is not entitled to fees which he has not earned. Cf. Quarterly Report of Attorney General, Vol. 24, page 142.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 10, 1949.

Honorable Ward W. McFarland,
State Highway Director,
CAPITOL.

State Markets Boards — State Highway Department — State Department of Corrections and Institutions.

"Labor expenses" incurred in the construction of roads, approaches, and paving in connection with State Markets Boards projects under Act No. 32, General Acts 1943, page 25, as amended, are proper charges against the State Department of Corrections and Institutions, even though the labor utilized was that of convicts under lease to the State Highway Department by the State Department of Corrections and Institutions on a monthly basis.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 2, 1949, is as follows:

"In re: Labor charges for Construction of State Markets Board projects:

"At various times during 1948 this Department was requested by proper representatives of the State Markets Board to construct certain roads, approaches, and paving work for them in connection with Markets Board Projects at Albertville, Ashville, and Montgomery. Under the terms of the Act creating the State Markets Board this Department is charged with the duty of furnishing without charge surveying and engineering services for such projects. The State Department of Corrections and Institutions is charged with the duty of furnishing without charge all labor for such projects. See Section 8, General Acts of Alabama, 1943, Page 28.

"Upon being requested to construct the above mentioned projects this Department proceeded to do so using for labor certain convict personnel leased on a monthly basis to this Department by the Department of Corrections & Institutions and who are skilled in this type of work. Our own personnel guarded these convicts and supervised their work.

"Following completion of the above projects this Department billed the Department of Corrections & Institutions in the amount of $2,506.94 which sum represented the value of the services of the leased convicts used on this work and the cost of supervising them. Upon refusal of the Corrections & Institutions Department to reimburse this Department for the labor costs connected with these projects, this Department deducted these costs from our monthly account with the Corrections & Institutions Department for November, 1948. This latter Department has disputed our right to do so on the ground that they were never requested to furnish labor for these projects by the Markets Board. However, since the terms of the Act require that the Corrections & Institutions Department furnish labor for such projects, it is our position that it is immaterial whether convicts are provided by the Corrections & Institutions Department from their own prisons or whether we use our leased convicts and deduct the costs of such labor from our account with the Corrections & Institutions Department. However, in view of the attitude of the Corrections & Institutions Department we shall only use convicts furnished independently by the Corrections & Institutions Department for these projects in the future whether or not such convicts are skilled in road work.

"It is requested that your Department advise us if this Department may properly deduct the above described convict labor and supervision charges from our account with the Department of Corrections & Institutions. It is our opinion that this question was answered in an opinion by Assistant Attorney General Screws under date of September 17, 1947 appearing at Page 247, Volume 48, Reports of Attorney General. However,, in view of the position taken by the Corrections & Institutions Department we have submitted the question to your office."

I am of the opinion that your inquiry should be answered in the affirmative.

Act No. 32, General Acts 1943, page 25 (amended in part not here material), authorized certain State Markets Boards projects. Section 8 thereof provides as follows:

> "Section 8. All surveying and engineering services in connection with the construction of roads, approaches, and paving connected with such market or markets shall be furnished by and shall be rendered under the supervision of the State Highway Department, without charge to the State Markets Board, and all labor for construction of such roads, approaches, and paving shall be furnished without charge by the State Department of Corrections and Institutions."

In construing Act No. 32, supra, as amended, and particularly the above quoted provision, this office held that "labor expenses," incurred in the construction of roads, approaches, and paving in connection with State Markets Boards projects authorized by said Act, were proper charges against the State Department of Corrections and Institutions, whether the labor be free or convict labor.—Quarterly Report of Attorney General, Volume 48, page 247.

The "labor expenses" incurred in connection with the projects, as outlined in your letter of inquiry, are proper charges against the State Department of Corrections and Institutions. Such expenses should be borne by said Department irrespective of the method of procedure by which the labor was furnished and utilized. The best procedure would have been to first request the State Department of Corrections and Institutions to furnish the labor as it is to bear the expense thereof. Nevertheless, in the instant case, the result is the same to the State Department of Corrections and Institutions as it is liable for the "labor expenses" incurred in connection with the projects in question.

The method of off-set employed by the State Highway Department in deducting the amount of the "labor expenses" involved from its monthly account with the State Department of Corrections and Institutions is merely one of accounting, the propriety of which is a matter of administrative determination. There is no objection to this procedure from a legal standpoint.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 10, 1949.

Hon. J. H. Brennan, President,
Board of City Commissioners,
Dothan, Alabama.

Municipalities.

1. A city or town may enact a valid ordinance prohibiting soliciting in certain residential areas under the police power without violating the commerce clause of the Federal Constitution.

2. An ordinance requiring a license for a person to solicit orders for goods from another state to be shipped to the purchaser violates the commerce clause of the Federal Constitution.

3. An ordinance which requires a license for solicitors of orders of goods should be interpreted and enforced by excepting those who solicit orders for articles in interstate commerce.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 2, 1949, is as follows:

"I hand you herewith copy of City of Dothan Ordinance No. 134 passed by the Board of City Commissioners on January 13, 1937, which prohibits soliciting in the residential area of the City of Dothan, Alabama, and declaring such soliciting to be a nuisance.

"I am writing to ask that you please advise if in your opinion this ordinance is constitutional, and not in conflict with Inter-State Commerce Laws and Regulations. The particular phase of soliciting under this ordinance which is being attacked verbally by representatives of such publication firms as Colliers, and other similar nature. These people contend that this ordinance is in restraint of freedom of the press and freedom of speech, etc."

The ordinance referred to in your inquiry is as follows:

"ORDINANCE NO. 134

"AN ORDINANCE RELATING TO NUISANCE

"BE IT ORDAINED by the Board of City Commissioners of the City of Dothan, Alabama, as follows:

"Section 1. The practice of going in and upon private residences of the City of Dothan, Alabama, by solicitors, peddlers, hawkers,

itinerant merchants, and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting order for the sale of goods, wares, and merchandise, and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor.

"Section 2. The Police Department of the City of Dothan is hereby required and directed to suppress the same, and to abate any such nuisance as is described in the first section of this ordinance.

"Section 3. The provisions of this ordinance shall not apply to persons employed by or representing any established merchant, business firm or corporation located and regularly doing business in the City of Dothan, Alabama, or to farmers selling any food item raised or produced by themselves, and/or to permanently established residents who are voters in the City of Dothan, Alabama, or any one duly licensed.

"Section 4. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

"Section 5. If any section, sentence, clause, phrase or other part of this ordinance is for any reason held invalid or unconstitutional, such decision shall not affect the validity of the remaining parts hereof.

"Section 6. Any person convicted of perpetrating a nuisance as described and prohibited in the first section of this ordinance, upon conviction thereof shall be fined in a sum not less than One dollar ($1.00) nor not more than one hundred dollars ($100.00) together with costs of proceedings.

"Section 7. This ordinance shall be in full force and effect after its due passage, approval and publication.

"PASSED this the 13th day of January, 1937.

"Approved this the 13th day of January, 1937."

I am further informed by your letter of March 12, 1949, of certain additional facts as follows:

"The ordinance which I sent you was designed to protect our housewives and others from the annoyance caused by solicitors going uninvited to their homes at all hours of the day for the sale of anything from magazines to hair brushes, etc. While this ordinance

was not intended to interfere with Inter-State Commerce as such, it was intended to stop agents, both from within the state and without the state from soliciting in our residential area. The persons complaining right now are representatives of the Collier people, publishers of magazines, etc. These people claim immunity from this ordinance because they are doing what they call an interstate business. As we understand it, they take subscriptions and collect a down payment as they go from house to house. The accounts are then left in the hands of one of our local citizens who sells periodicals here in Dothan.

"I am enclosing herewith a copy of our current privilege license schedule to answer the second paragraph of your letter."

The city of Dothan also has a license schedule which it is not necessary to copy at length. It is sufficient to state that the schedule requires a license for agents selling books, itinerant dealers, merchants and peddlers. There are other occupations listed in the licensing schedule.

In my opinion, Ordinance 134, supra, as applied to agents soliciting and taking orders for magazines, which magazines are to be shipped to the purchaser from out of the state, is in violation of the commerce clause of the Federal Constitution. It is further my opinion that said ordinance should not be enforced against persons soliciting orders for goods in interstate commerce as described in your inquiry.

With the exception of Section 3 of Ordinance No. 134 of the city of Dothan, it is the same as that considered by the United States Circuit Court of Appeals for the Tenth Circuit in the case of **Town of Green River v. Fuller Brush Co.**, 65 F. 2d 112, 88 A. L. R. 177. In that case, an identical ordinance, but not containing a section similar to Section 3 of the Dothan ordinance, was upheld by the federal court. It was expressly held by the Circuit Court of Appeals that such an ordinance did not deny due process of law nor equal protection of the law, nor unlawfully interfere with interstate commerce. In substance, it was held that the ordinance was designed to protect residential areas from uninvited solicitors, also that the ordinance was an exercise of reasonable police power by the municipality. I emphasize, however, that the ordinance considered in the **Green River** case, supra, prohibited soliciting and peddling in certain residential areas without the exception of certain persons, classes, or groups. For that reason then, I must consider the effect of Section 3 inserted in the Dothan ordinance.

The effect of Section 3 of the Dothan ordinance, supra, is to require solicitors going upon private residences in the city of Dothan to obtain a city license if the person so soliciting is not (1) employed by or representing an established merchant of the city of Dothan, (2) a farmer selling his own products, and (3) a permanently established resident voter of Dothan, Alabama. Persons other than these three classes must be duly licensed, else they are a nuisance and subject to the penalties of the ordinance.

A statute or ordinance may make a reasonable classification in favor of farmers selling their own products for market. **Madison County v. Gwathney**, 212 Ala. 56, 103 So. 656. Classifications can also be made in respect to representatives of the established merchants. **American Bakeries v. City of Opelika**, 229 Ala. 388, 157 So. 206. **Singer Sewing Machine Co. v. Brickell**, 233 U. S. 394, 58 L. Ed. 974, 34 S. Ct. 493. But a city or town or state may not require the agent or representative soliciting orders for goods, and in this case magazines, which are to be shipped directly to the purchaser from another state, to pay a license or tax, because such a license or tax is a regulation of interstate commerce. **Dozier v. Alabama**, 218 U. S. 124, 24 L. Ed. 965, reversing 154 Ala. 83, 46 So. 9; **City of Roanoke v. Stewart Gro. Co.**, 235 Ala. 23, 176 So. 820. Title 37, Section 735, Code of Alabama 1940; **Real Silk Hosiery Mills v. Portland**, 268 U. S. 325, 69 L. Ed. 892, 45 S. Ct. 525; **Singer Sewing Machine Co. v. Brickell**, supra.

Since the ordinance in question, and especially Section 3 thereof, would require a license for one soliciting orders for magazines which we may safely assume are out of the State of Alabama, and which magazines are to be shipped to the purchaser, it is my opinion that such a license requirement violates the commerce clause of the Federal Constitution.

This does not mean, however, that the ordinance of the city of Dothan is entirely void. It means that the requirement for a license as provided in Section 3 of the ordinance must not be enforced against solicitors in the city of Dothan who are soliciting orders for goods to be shipped in interstate commerce directly to the purchaser. In **Singer Sewing Machine Co. v. Brickell**, supra, it is stated:

> "The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural presumption that the legislature was intending to tax only that which it constitutionally might tax. So construed, it does not apply to interstate commerce at all. . . ."

If the ordinance is so administered and enforced, that is to say, by not enforcing its licensing provisions against those persons soliciting orders for goods in interstate commerce, it is my opinion that said ordinance would not violate the commerce clause of the Federal Constitution in respect to those persons now complaining and referred to in your inquiry.

I further point out that if the ordinance was so framed as to prohibit all soliciting in certain residential areas in the city of Dothan, it could be sustained on the basis of the holding in **Town of Green River v. Fuller Brush Co.**, supra. But Section 3 of the ordinance, supra, indicates to me that the Dothan ordinance goes further than a mere police regulation and attempts to require a license when the solicitor is not a farmer, a representative of a Dothan firm, or a resident voter of Dothan.

Persons other than these classes when soliciting orders for goods in interstate commerce can only be regulated or taxed by Congress.

Inasmuch as I have stated that the Dothan ordinance cannot be applied to solicitors of orders for goods in interstate commerce, it is unnecessary to go into the question of whether or not the ordinance violates those constitutional guaranties of free speech and free press. Neither have I considered other constitutional questions which may arise in connection with the ordinance, such as due process of law, privileges and immunities of citizens, and unreasonable discriminations and classifications.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

May 10, 1949.

Hon. William T. Seibels,
Circuit Solicitor,
15th Judicial Circuit,
Montgomery, Alabama.

Lie Detector—Counties—Sheriffs—Solicitors.

1. Evidence as to the results of a lie detector test is not admissible in a criminal trial.

2. A confession or other evidence is admissible provided it meets all requirements of admissibility, even though it was secured by use of a lie detector.

3. The expenses for the use of a lie detector and the services of its operator used in a special investigation of a crime made by a sheriff at the direction of a circuit solicitor, when approved by the circuit solicitor directing the investigation, may be paid by the county governing body under the authority of Title 54, Section 10, Code of Alabama 1940.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of February 4, 1949, is as follows:

"I desire to know whether evidence adduced by the aid of a lie detector would be legal evidence in a court of justice. I do not know of any statute in Alabama which would admit testimony ob-

tained through the use of a lie detector, wherein the defendant, or witness, voluntarily or involuntarily, was subjected to the use of said machine.

"The question is whether this evidence would be legal, and a further inquiry is, whether the County would be liable for a bill incurred by the Sheriff or the Solicitor for the use of a lie detector; in other words, the Sheriff or the Solicitor, believing that said instrument would 'break' a case, and give them such information as would help in a conviction of a defendant, incurred expenses incident to the use of said machine, would that be a proper charge against the County?"

In reply to your first question as to the admissibility of evidence obtained by the use of a lie detector, it is my opinion that the results of the test itself is not admissible, but the evidence obtained by the use of the device is admissible when it consists of a fact or proof which is otherwise valid, such as a confession.

"In the almost twenty years that have elapsed since the question of the admissibility of a lie detector test in a judicial proceeding was first passed upon in a reported case, only one decision has been found holding such a test admissible. (People v. Kenny (1938) 167 Misc 51, 3 NYS (2d) 348.) In all other reported cases the courts have rejected such tests upon the ground that their reliability has not yet been sufficiently established. * * * * * *" 139 A. L. R. 1174.

Evidence as to the result of a lie detector test is not admissible in evidence on behalf of defendant in a criminal case to show that he was telling the truth, where general scientific recognition of such test is not shown. **People v. Becker,** 300 Mich. 562, 2 N. W. 2d 503, 139 A. L. R. 1171; **People v. Forte,** 279 N. Y. 204, 18 N. E. 2d 31, 119 A. L. R. 1198; **State v. Bohner,** (Wisc.) 246 N. W. 314, 86 A. L. R. 611; **Frye v. United States,** 54 App D. C. 46, 293 Fed. 1013, 34 A. L. R. 145; 20 Am. Jur. 633.

While they were not speaking of the lie detector at the time, our own Supreme Court, years ago, indicates its reluctance to rely on manifestations of the emotions, when it said in **Gassenheimer v. State** (1875) 52 Ala. 313:

"The mental emotions, the manner in which they will be manifested, the causes which will produce them, are as varied and various as the faces and physical organizations of men. It is a dangerous species of evidence, and too much caution cannot be exercised in receiving and weighing it."

While the results of the test itself is not accepted by the courts, confessions, otherwise admissible, obtained by the use of a lie detector have been admitted. **Commonwealth v. Hipple, 333 Pa. 33, 3 Atl. 353; State v.**

Deheart, 242 Wisc. 562, 8 N. W. 2d 360; **State v. Collett**, 140 Ohio 639, 58 N. E. 2d 417; **Commonwealth v. Jones**, 341 Pa. 541, 19 Atl. 2d 389; but see **People v. Sims**, 395 Ill. 69, 69 N. E. 2d 336.

Most of these cases have adhered to the principle approved in Alabama (Curry v. State, 203 Ala. 239, 82 So. 489) that a confession, otherwise admissible, obtained by a trick is admissible in evidence if not calculated to produce an untruth.

In answer to your second question, in the absence of a statute providing for reimbursement of the sheriff for expenses incurred in the performance of his official duties, the county is not liable for the payment of such expenses. The rule is stated in 57 C. J., Sheriffs and Constables, Section 1208, as follows:

> "A county is liable to a sheriff * * * for his * * * expenses in connection with enforcement and execution of criminal or penal laws when, and only when, there is an applicable statute so providing; and where the case is within the statute imposing liability on the county, but there is an applicable statutory limitation of the amount of liability, the county will be held liable within, although not beyond, the prescribed limitation."

It is my opinion that a sheriff acting of his own volition in utilizing the services of a lie detector and its operator would merely be performing the duty imposed upon him by Title 54, Section 5(4), Code of Alabama 1940, "to secure evidence of crimes in their counties." The sheriff and his deputies are charged with the duty of ferreting out crime and securing evidence and cannot be reimbursed from county funds for money expended in so doing. Quarterly Report of Attorney General, Volume 30, page 102.

However, if the expenses incurred by the sheriff in using the services of a lie detector and its operator were incurred while conducting a special investigation ordered of him by any one of the officers named in Title 54, Sectoin 9, Code of Alabama 1940, it is my opinion that such expenses may lawfully be paid, if claim for such be presented and approved in the manner prescribed by Title 54, Section 10, Code of Alabama 1940.

Title 54, Section 9, supra, provides as follows:

> "The sheriffs in their respective counties whenever directed to do so in writing by such solicitors, or by the attorney general or governor, shall make special investigation of any alleged violation of the law in their counties, and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly, after its preparation, be presented to the official who directed the investigation and if such official be

the governor or attorney general he may present it to any solicitor prosecuting criminal causes in the county. The sheriff of the county shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid."

With regard to the payment of the expenses incurred in the conducting of such investigation, it is provided by Title 54, Section 10, supra, that:

"The expense of such investigation when so ordered shall be paid from the county treasury, upon a warrant properly drawn; and after the report is made, the sheriff shall file with the board of revenue or court of county commissioners a detailed sworn statement of his expenses accompanied by the written approval of the officer directing the investigation, and the board of revenue or court of county commissioners shall audit and allow only so much thereof as it shall find reasonably necessary unless it is approved by the governor or attorney general, in which event they shall allow the amount approved; and for such investigation, in addition to his expenses which may include any actual cost of travel that was necessary, the sheriff shall be allowed a fee of four dollars, but if the investigation consumes one day or less, then a fee of two dollars, and the fee and allowed expenses must be paid in each case from the county treasury upon a warrant drawn according to law. Every such solicitor shall direct the sheriff to make such investigation and report when a written request to that effect setting forth the alleged violation of the law is presented to him signed by twenty-five reputable citizens of the county."

It has been held by former opinions of this office that, under the authority of Title 54, Section 10, supra, and its predecessors, the county may legally pay for the chemical analysis of alleged prohibited liquors, Biennial Report of Attorney General, 1932-34, page 324; for travel expenses, Quarterly Report of Attorney General, Vol. 48, page 45; for the services of a pathologist, Quarterly Report of Attorney General, Vol. 19, page 320; for the services of a physician, Quarterly Report of Attorney General, Vol. 18, page 90; for a motorboat and grapnel, Quarterly Report of Attorney General, Vol. 49, page 117; for radio equipment, Quarterly Report of Attorney General, Vol. 46, page 59; for the services of common laborers and an undertaker in the exhumation and examination of a dead body, Quarterly Report of Attorney General, Vol. 47, page 114.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 10, 1949.

Hon. R. P. McRee, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

Beer—Alabama Alcoholic Beverage Control Board.

1. The withdrawal from storage of malt or brewed beverages in kegs or containers exceeding one pint is an integral part of dispensing beer.

2. It is unlawful to dispense draft or keg beer in Alabama.

Opinion by Assistant Attorney General Sykes.

Dear Sir.

Your request for an official opinion bearing date of April 22, 1949, is as follows:

"Attached hereto you will find a copy of letter we received from the Spearman Brewing Company, of Pensacola, Florida, in which they ask permission to store draft beer in ice houses located at Flomaton and Atmore, said beer to be sold and distributed in the State of Florida.

"The Board in a recent meeting approved the storage of this beer provided that it was not in violation of our State Law.

"We will appreciate it very much if you will advise us whether or not such storage would be in conflict with our State Law."

In my opinion, the storage and withdrawing from storage of draft beer in kegs or containers exceeding one pint is illegal in Alabama.

Title 29, Section 34, Code of Alabama 1940, provides in part as follows:

"All malt or brewed beverages must be sold or dispensed from bottles, cans, or other container not to exceed one pint or sixteen ounces. There shall be no draft or keg beer or malt beverages sold or dispensed within this state; . . . ."

The meaning of the term "dispense" is found in Words and Phrases, Vol. 12, page 674. It is defined as follows:

" 'To deal out in portions; to distribute; to give.' Webster's New International Dictionary. 'To deal out; to apportion; to dis-

tribute. To dispense is to deal out generally or indiscriminately; to distribute, deal out to, or divide among individuals.' Worcester's Dictionary. 'To deal or divide out; give forth diffusively, or in some general way; practice distribution of.' Century Dictionary. A restaurant keeper who serves to his patrons at his premises intoxicating liquors to whomsoever orders and pays for the same 'dispenses' liquor within the meaning of the statute. It has also been held that giving away liquors constituted dispensing. Sawyer v. Frank, 132 N. W. 861, 152 Iowa 341, citing Johnson v. Chattanooga, 36 S. W. 1092, 97 Tenn. 247."

" 'Dispense' means to deal out in portions; to distribute; to give. State v. Ball, 123 N. W. 826, 827, 19 N. D. 782."

See also **Mitchell v. State,** 134 Ala. 392, 32 So. 687, discussing "liquor dispensary."

In my opinion, the storage of beer in kegs or other large containers in the State of Alabama, and the withdrawal from storage of such kegs or containers would be an unlawful sale or dispensation of beer within the meaning of Section 34, supra.

The statute above quoted was enacted for the purpose of preventing the selling and dispensing of malt or brewed beverages from kegs. See Quarterly Report of Attorney General, Vol. 20, page 13.

In the case outlined by your inquiry, although there would be no dispensing of beer from the keg itself, the separate and several kegs or containers of beer would be distributed or dispensed in the State of Alabama even though the kegs were to be delivered to a Florida distributor. Since the selling or dispensing of draft beer in kegs is illegal in Alabama, it is my opinion that the storage and withdrawal from storage of such beer in Alabama is an integral part of dispensing such beer wherever the final dispensing takes place, and is, therefore, unlawful. Title 29, Section 78, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

May 11, 1949.

Mrs. Edwina Mitchell,
Associate Member,
Board of Pardons and Paroles,
State of Alabama,
CAPITOL.

Convicts—Insane Prisoners—Alabama Insane Hospital.

An insane prisoner confined to the Insane Hospital at Tuscaloosa under Title 45, Section 222, Code of Alabama 1940, may

receive credit for the time of his confinement against his sentence.

Opinion by Assistant Attorney General Nachman.

Dear Madam:

Your request for an official opinion bearing date of April 4, 1949, is as follows:

"With your approval we submit the following on the question of whether or not a prisoner committed by the Governor to the Bryce Hospital for the Insane under authority of Title 45, Section 222, Code of 1940, should be credited on his sentence with time spent in the hospital.

"That for a hundred years there has been no judicial interpretation of Title 45, Section 222, is a commentary on society's neglect of its unfortunate citizens. An opinion of the Attorney General, dated March 9, 1943 (not reported) was in answer to the question as affected by the present parole law (Title 42). We agree with the findings of the Attorney General that Title 45, Section 222, is in no way affected by Title 42 providing for parole.

"The history of the authority to order the commitment of insane prisoners to a hospital begins in 1841 and was contained in the Penal Code adopted that year under authority of Article 5, Section 19, of the Constitution, as follows:

" 'Whenever the physician of the penitentiary shall report to the warden that any convict confined therein is insane, it shall be the duty of the warden to cause such convict to be removed to the hospital for maintenance until the expiration of the term for which he shall be sentenced, if he shall so long continue insane; and if such insane person shall recover from his insanity before the expiration of the term for which he was sentenced, the warden shall cause him again to enter on his regular labor as a convict.' Clay's Digest, p. 401, s. 31.

"There was at that time in Alabama no hospital for the care and treatment of the insane. The prisoner was committed to the prison hospital and, of course, was credited with service on his sentence for the period spent therein.

"The Alabama Insane Hospital was established in February, 1852. Soon thereafter we find the Governor authorized to order the removal of insane prisoners to the state hospital for the insane at Tuscaloosa. The Code of 1867 provides:

"Section 1067—'The physician of the penitentiary must report to the Governor the names of all insane convicts imprisoned in the

penitentiary for less period than life time whose general deportment in the penitentiary has been good and whose character was good before they were sent to the penitentiary and who were not sent there for rape.

"Section 1068—'The Governor must when any case of insanity is reported to him under the preceding section appoint three physicians of skill and experience, of whom the physician of the penitentiary must be one, to examine the persons reported to be insane and report to him the result of such examination, and if such board of physicians shall report such person insane and a fit subject for the hospital for insane persons the Governor must cause such person to be removed to the hospital for insane persons at Tuscaloosa at the cost of the state.

"Section 1070—'A convict to the penitentiary sent to the insane hospital must upon his restoration to sanity before the expiration of his term of imprisonment be returned to the penitentiary or discharged as the Governor may order.'

"The authority to order the transfer of insane prisoners to the state hospital for the insane has been brought down from that date to the present. The prison system in Alabama never has had and still does not have any facilities for the care and treatment of insane convicts. It is reasonable to assume, therefore, that the provision for the transfer of insane prisoners to a state hospital had a three fold purpose: to relieve the prison authorities of a disciplinary problem that they were not equipped to handle, to protect the other prisoners, and to treat humanely an unfortunate, irresponsible prisoner.

"In the absence of any specific expression of the legislative intent, we believe it illogical to assume it was intended that the insane prisoner should be penalized for his insanity by having his sentence extended for such period of time as he is required to spend in the hospital for the insane.

"We have examined the authorities cited by the Attorney General in the opinion above referred to. We find not a single case in point. The cases cited under 24 C. J. S. Section 1619 and 16 C. J. Section 3144 all refer to the stay of execution of the death penalty of one who becomes insane after conviction or after the sentence has been pronounced.

"In the case of Talley vs Beavers, 80 SE 556, on petition for writ of habeas corpus, petition was denied on the following statement of facts: Talley was convicted of violation of city ordinances, was sent to a hospital for the insane on July 9, 1912, **before the beginning of the execution of the sentence,** was discharged as 'not insane' on October 14, 1912. The sentence had never been executed.

"The only authority we can find that is directly in point is the case of State vs Brouilette, 111 So. 163, La. 46. The petitioner began the service of his sentence, became ill and was sent to a private hospital for treatment. A Louisiana statute provides that where 'large numbers' of prisoners are confined the authorities must provide hospital facilities for those who become ill but makes no provision for hospitalization of prisoners confined in small prisons. The court held the petitioner was entitled to credit for time spent in the hospital.

"States more prosperous than Alabama provide in their prison systems for the care and treatment of mentally ill prisoners. New York and other states, as well as the Federal system, provide by law for the commitment of their insane prisoners to a hospital operated by the prison departments, and all prisoners so committed are credited on their sentences with the time spent in such hospitals.

"We believe that it was the legislative intent that, in the absence of facilities for the care and treatment of insane prisoners in Alabama's prison system, the state hospitals for the insane be treated as an adjunct of the state prison system. Prisoners committed to the state hospitals are under involuntary restraint and custody and to hold that the commitment suspends the execution of the sentence is to penalize the prisoner for his illness by increasing the penalty fixed by the court."

By way of preface, it should be pointed out that the authorities on this point are scarce. Some State Legislatures have provided specifically by statute that an insane prisoner's period of confinement in a hospital for the insane shall be credited on such prisoner's sentence. Other State Legislatures have made provisions for facilities within the penitentiary which are adequate to take care of prisoners who become insane. But where the Legislature has been silent on the crediting of time spent in insane hospitals outside the prison, and where no provision is made for insane facilities to care for insane prisoners, the authorities are indeed scanty. The point is not specifically covered in Title 45, Section 222, supra, nor have the courts of this state decided the question.

The Alabama Legislature in Title 45, Section 222, supra, did, however, specifically recognize that state and county convicts, who become insane after incarceration, should be given special medical and psychiatric treatment. The Legislature considered that these "insane convicts" continued to be "convicts" during the period of confinement in the insane hospital.

"When any convict, who is a patient in the insane hospital, has recovered, the superintendent shall notify the proper officer of the fact, who shall immediately remove the patient." (Title 45, Section 224, Code of Alabama 1940. (Emphasis supplied.)

The Legislature provided for such medical and psychiatric treatment in the insane hospital at Tuscaloosa. Treatment at Tuscaloosa was clearly

intended to be in lieu of special prison facilities. Therefore, no valid reason is apparent for distinguishing an insane prisoner confined in the insane hospital at Tuscaloosa from an insane prisoner confined in an insane hospital within the walls of Kilby Prison, if there were such a hospital at Kilby. Certainly, no one would seriously contend that the time which a prisoner spent in a prison hospital should not be credited against his sentence.

There are other reasons for crediting confinement time in insane hospitals. The prisoner's liberty is still restrained. The prisoner may be sent only to the insane hospital at Tuscaloosa. He may not go to any private institution for the insane within Alabama, or to a similar private or public institution outside the State. See Quarterly Report of Attorney General, Vol. 38, page 13. Not even the Governor may send the prisoner elsewhere. When he is recovered, presumably during the pendency of his sentence, the prisoner must be removed in accordance with the provisions of Title 45, Section 224, supra. Cf. **State ex rel Sullivan v. Cocke, et al**, 68 S. W. 2d 933. If the prisoner should escape from the hospital at Tuscaloosa he would certainly be an escaped convict, and not merely an escaped patient.

Two cases precisely holding that confinement in an insane asylum should be credited on a prison or jail sentence are **State ex rel Siehl v. Jorgenson**, 176 Minn. 572, 224 N. W. 156, 62 ALR 244, and **State v. Brouillette**, 163 Ala. 46, 111 So. 491. In fact, these cases are the only authorities either way on the point. The **Jorgenson** Case arose in Minnesota where there was a statute allowing credit for a **state prisoner** who was committed to an insane hospital pursuant to the statute. However, the relator in the **Jorgenson** Case was serving a sentence in the county jail when he became insane, and the statute, therefore, did not apply to him. The court decided that, "Common justice would seem to require the time of his sentence to run during his enforced absence from the jail (i.e., while in the insane asylum)."

The Louisiana Court in the **Brouillette** Case said:

> "* * * Hence, ex ipsa necessitate rei, where a prisoner falls ill in a prison which is not provided with proper hospital facilities, it follows that a humane judge and sheriff (such as these respondents appear to be, as are also most judges and sheriffs) have no other recourse but to use the hospital facilities nearest at hand; for a prisoner is no more to be done to death through neglect than by ill treatment.
>
> "Hence it follows, in our opinion (and we feel sure that our view will be indorsed by enlightened public opinion generally), that a prisoner confined by illness to a hospital, whether within the confines of the prison itself or elsewhere, is entitled to count the time of such confinement against his sentence."

For the reasons set forth above it is my opinion in line with the authorities cited, that an insane prisoner confined in Tuscaloosa Insane Hospital under Title 45, Section 222, Code of Alabama 1940, may receive credit for the time of confinement in such hospital against his sentence.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 13, 1949.

Hon. Ben J. Kirk, Sr.,
Mayor, Town of Parrish,
Parrish, Alabama.

Recorder's Court—Municipalities—Parden, Parole and Probation.

1. A mayor of a municipal corporation has authority to direct the discharge on parole of any person sentenced for violation of a municipal ordinance.

2. In such cases, the mayor may prescribe the terms of the parole.

3. Upon violation of the terms of the parole, including failure to pay the fine and costs, if payment of same is a condition of the parole, defendant may be rearrested upon order of the mayor.

4. Upon rearrest, after violation of terms of parole, defendant must serve sentence.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of May 6, 1949, is as follows:

"An opinion is hereby requested of your office as soon as we may get it, answering the following:

"1. Where one is convicted in the Mayor's Court of an offense in violation of an ordinance of the town, and accepts, but ask that the court grant him time in making payment of the fine and cost, without a surety bond, and after several months failed to carry out his agreement. Can the Town re-arrest the party or enforce collection of said fine and cost?"

In my opinion, the person convicted in the mayor's court as described in your inquiry may be rearrested on order of the mayor for failure to carry out his agreement to pay the fine and costs.

Title 37, Section 600, Code of Alabama 1940, makes the mayor ex officio recorder of the city or town when there is no other recorder. Title 37, Section 599, Code of Alabama 1940, grants the mayor certain powers in connection with persons who have been convicted for violating municipal ordinances. Among those powers is the power of the mayor to direct the discharge of a person convicted for the violation of a city ordinance, and place such person on parole. The mayor is further authorized to prescribe the terms upon which such person is so paroled and his sentence suspended. Section 599 further provides:

> "Upon failure of any person so paroled to observe the conditions of his parole to be determined by the mayor, the mayor shall have the authority to direct the rearrest and return of such person to custody."

It is further provided in Section 599, supra:

> "Any person so paroled, when arrested for violation of the terms of his parole, ... shall be required to carry out the sentence of the recorder or of the court as though no parole had been granted him, notwithstanding his sentence would have ended but for the suspension thereof by parole. . . ."

As I interpret the facts in your inquiry, the mayor, after convicting the offender for violating the city ordinance, placed the defendant on parole, the terms of which were that the defendant was to make certain payments at specified intervals. The failure to make such payments is a violation of the parole. In his discretion, therefore, the mayor may order the rearrest of the defendant and cause his sentence to be executed.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

May 17, 1949.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
Montgomery 4, Alabama.

Department of Commerce—Appropriations—Funds.

1. An appropriation made by the Legislature for the purpose of paying the salary of the Supervisor of Loans, the salaries

of the employees of the Bureau of Loans, and all other expenses incident to carrying out their duties, can be used for those purposes and no other.

2. An appropriation made by the Legislature for the purpose of paying the salaries of the Supervisor of Rates and employees of the Bureau of Rates, and the expenses incurred in carrying out their duties, can be used for those purposes and no other.

3. Quarterly Report of Attorney General, Vol. 16, page 56, held to have no present application.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 17, 1948, is as follows:

"The Bureau of Loans was created in the Department of Commerce by Act 159, General Acts 1945, Page 200. Section 6 of said Act established a special fund in the Treasury derived from the proceeds of licenses collected by the Bureau of Loans, and provided that the salaries of the Supervisors and Employees of the Bureau of Loans, and 'all expenses incurred incident to the carrying out of their duties' should be paid from such special fund. The fund so established is called the Bureau of Loans Fund. Act 159 was amended by Act 124, General Acts 1947, Page 36. However, the amendment has no bearing on the question presented herein.

"I wish to ask your official opinion on the following questions:

"1. The Director of the Department made a trip to New York for the purpose of attending a conference on Insurance Rate Supervisory Methods, relating wholly to the Insurance Bureau and Bureau of Rates work, and charged the expenses to the Bureau of Loans Fund. Was the expenses of such trip a legal charge against the Bureau of Loans Fund?

"2. The travel expense accounts of various Bank Examiners and deputy Fire Marshals were at various times charged to the Bureau of Loans Fund, though the duties performed by them had no connection with the operations of the Bureau of Loans. Were expenditures of this character legal charges against the Bureau of Loans Fund?

"3. The salary of L. L. Gwaltney, Jr., as Superintendent of Insurance, whose duties in no wise relate to the Bureau of Loans, was paid from the Bureau of Loans Fund to the extent of $1,000.00. Was

such salary a proper and legal charge against the Bureau of Loans Fund?

"4. H. F. Benton, Administrative Assistant, was for a time assigned to the Bureau of Loans as Supervisor or Acting Supervisor. Subsequently, after a regular Supervisor was appointed, Mr. Benton's salary as Administrative Assistant to the amount of $1,800.00 was paid from the Bureau of Loans Fund. Was such a salary a legal charge against the Bureau of Loans Fund?

"5. Two automobiles were purchased from the Bureau of Loans Fund. One of these cars up to a time about eighteen months after its purchase had been used wholly for the transportation of the employees of other bureaus of the Department and there has been no contention that it was ever intended to be used by the employees of the Bureau of Loans. The other car was used for some six weeks of the same eighteen months period by one of the employees of the Bureau of Loans. For the remainder of the time it has been used by the employees of the other bureaus of the Department. Was the purchase of these cars legally chargeable to the Bureau of Loans Fund?

"6. All the gas, oil, maintenance and repair expense of every character of all the various cars used by the Director, the Insurance Examiners and the Bank Examiners for the entire fiscal year ending September 30, 1947, was paid from the Bureau of Loans Fund. Only the Director's general supervision over the Bureau of Loans was in anywise concerned with the work of the Bureau of Loans. Were such expenses proper and legal charges against the Bureau of Loans Fund?

"7. Act No. 118, General Acts, 1945, Page 111, established the Bureau of Rates in the Department of Commerce. Section 4 of said Act appropriates $12,000.00 annually to pay the salaries of the Supervisor of Rates, his assistants and employees and all expenses incurred 'incident' to the carrying out of their duties.'

"The salaries of L. L. Gwaltney, Jr., Superintendent of Insurance, and Paul L. Smith, rated as Chief Clerk in the Bureau of Insurance, whose duties were in no wise connected with the Bureau of Rates, to the amount of $1,400.00 and $1,100.00, respectively, were charged to the Buerau of Rates appropriation. Were such salaries properly chargeable to that appropriation?"

It is my information that the expenditures referred to in your request were made during the fiscal year commencing October 1, 1946, and ending September 30, 1947.

Section 6 of Act No. 159, General Acts 1945, page 200, which created the Bureau of Loans in the Department of Commerce, provides as follows:

"The salaries of such Supervisor and employees and all other expenses incident to carrying out the duties of said Supervisor and employees, shall be paid as the salaries of other state officials and employees are paid, and the other said necessary expenses shall be paid as is now provided by law; provided, however, that the salaries of the said Supervisor and employees, and all expenses incurred incident to the carrying out of their duties shall be paid out of a special fund to be set up by the Treasurer from all funds derived from funds paid into the Treasury by the Bureau of Loans; provided further that there is hereby appropriated out of any funds in the State Treasury the sum of twenty thousand dollars ($20,000.00) for the fiscal year beginning on October 1, 1945. Whenever in the opinion of the Director of the Department of Commerce there is in said fund an amount in excess of that required for the administration of this act the same shall on order of the Director be transferred to the general fund of the State."

It will be seen from Section 6, supra, that the salary of the Supervisor of Loans, the salaries of the employees of the Bureau of Loans, and all expenses incident to carrying out the duties of said supervisor and employees shall be paid from a special fund set up by the Treasurer from all funds paid into the treasury by the Bureau of Loans, which, as stated in your letter of inquiry, is known as the Bureau of Loans Fund. These funds are derived from licenses collected by the Bureau of Loans under the provisions of Section 2 of Act No. 159, supra.

The Legislature, by Section 6, supra, appropriated for the purpose of paying the salary of the Supervisor of Loans, the salaries of the employees of the Bureau of Loans, and all other expenses incident to carrying out their duties, so much of said special fund as was necessary for such purposes. This appropriation was made solely for the purpose of administering Act No. 159, supra, and can be used for no other purpose.

In view of the above conclusions, it is my opinion that the expenditures referred to in your first, second, and third inquiries, none of which relate in any manner to the administration of the Bureau of Loans, were not proper charges against the Bureau of Loans Fund, and should not have been paid from such fund.

Under the provisions of Act No. 159, supra, the Bureau of Loans was "created in the Department of Commerce." Title 55, Section 24, Code of Alabama 1940, provides that the Director of Commerce "shall be the chief executive officer of the department of commerce and all the powers, authority and duties vested in the department of commerce shall be exercised by the director, through the several bureaus thereof under the supervision of the director." It will thus be seen that the Bureau of Loans is administered under the supervision of the Director of Commerce. It is my opinion that the Director may, in his discretion, properly allocate such portion of the salary of his administrative assistant to the Bureau of Loans as is reasonably related to the duties which he performs for such bureau, and that the same may properly be paid from

the Bureau of Loans Fund. I assume that this was done, and, on such assumption, it is my opinion that the portion of the salary of the administrative assistant referred to in your fourth inquiry was a proper charge against the Bureau of Loans Fund.

In answer to your fifth inquiry, it is my opinion that the automobile referred to therein, which was used wholly for the transportation of the employees of other bureaus of the Department of Commerce, could not be properly purchased out of the Bureau of Loans Fund. In reference to the other automobile referred to in this inquiry, which "was used for some six weeks by one of the employees of the Bureau of Loans," it is my conclusion that if, at the time of purchase, this car was to be used by an employee of the Bureau of Loans in the performance of his official duties, it could properly be paid for out of the Bureau of Loans Fund. The fact that such automobile was subsequently used by employees of other bureaus in the Department of Commerce has no bearing on the legality of the use of funds of the Bureau of Loans for the purchase of the same, if it was in fact purchased for the use of the Bureau of Loans.

In answer to your sixth inquiry, it is my opinion that gas, oil, and repair expenses of cars used by the insurance examiners and bank examiners in the performance of their duties are not proper charges against funds of the Bureau of Loans. However, in view of the fact that the Bureau of Loans is administered under the supervision of the Director of Commerce, it is my conclusion that such portion of the gas, oil, and repair expenses for the car used by the Director as is reasonably related to the duties which he performs in the supervision of such bureau may be paid for from the Bureau of Loans Fund.

The Bureau of Rates of the Department of Commerce was created by Act No. 118, General Acts 1945, page 111. Section 4 of this Act provides in part as follows:

> "The salaries of such Supervisor of Rates, assistants, and employees, and all expenses incurred incident to the carrying out of their duties shall be paid in the same manner as other State employees; that there is hereby appropriatd out of any funds in the State Treasury the sum of twelve thousand ($12,000.00) annually beginning the fiscal year on October 1, 1945.'

The appropriation made by Section 4, supra, is for the purpose of paying the salaries of the Supervisor of Rates and employees of the Bureau of Rates, and the expenses incurred in carrying out their duties. It is my conclusion that the appropriation may be spent for no other purpose.

The expenditures referred to in your seventh inquiry were for purposes not related to the administration of the Bureau of Rates, and, therefore, were not proper charges against the appropriation made to said bureau by Section 4, supra.

In answering your questions, my responses have, of course, been based upon the facts as set forth in your inquiry. It is no part of the duties of this office, in answering requests for opinions, to pass upon possible disputed questions of fact.

At the same time, I am necessarily familiar with the general practices prevailing in the Department of Commerce, as well as in other departments, over a long period of years, embracing previous administrations as well as the present administration. My understanding is that all monies in the Bureau of Loans Fund (the special fund created by Section 6 of Act No. 159, supra) have been legally deposited in the State Treasury and have been drawn out on vouchers in all respects as required by law. So far as I am advised, all expenditures from the Bureau of Loans Fund have been for legitimate functions of the Department of Commerce. The same is true as to the appropriation made by Section 4 of Act No. 118, supra (the Act creating the Bureau of Rates of the Department of Commerce).

The question of whether the Director of Commerce, in exercising his discretion to allocate the duties of employees and the expenses of the various functions of the Department to be paid for out of the several funds has exercised such discretion too widely so as to call for payments from the Bureau of Loans Fund and from the appropriation in the Act creating the Bureau of Rates of the Department has not heretofore been presented to the Attorney General for an opinion.

I am, however, advised that since the creation of the Bureau of Loans in the Department of Commerce by Act No. 159, supra, the administrative officials charged with the administration of the Department of Commerce have used monies in the Bureau of Loans Fund not only for the purpose of paying the salary of the Supervisor of Loans, the salaries of the employees of the Bureau of Loans, and all other expenses incident to carrying out their duties—the purpose for which said special fund was created—but also to pay some of the salaries and defray some of the expenses of the Department of Commerce generally; and that the various other administrative officials with duties in the premises, including the Examiners of Public Accounts, have acquiesced in and approved of this practice (see Report of Examination of the Department of Commerce for the period October 1, 1945, to September 30, 1946, filed on March 4, 1947, and especially the second paragraph, under the heading "Comments" on page 2 of the letter transmitting the report to the Governor). The same is true as to the appropriation made by Section 4 of Act No. 118, supra, for the payment of the salaries of the Supervisor of Rates, his assistants and employees, and the expenses incurred incident to the carrying out of their duties.

My attention has been called to an opinion appearing in Quarterly Report of Attorney General, Vol. 16, page 56, dated July 18, 1939, which held that all appropriations and funds accruing to the various bureaus, boards, and departments, which then constituted and composed the Department of Commerce, could be consolidated into one fund and be used

to pay the salaries and defray the expenses of the Department of Commerce generally. This was held to be true even as to the special fund created for the maintenance of the office of the State Fire Marshal, and the payment of the expenses incident thereto, which office had been made a part of the Department of Commerce, even though the then applicable statute pertaining to said special fund (Schedule 160.21 of the General Revenue Act of 1935, Act No. 194, General Acts 1935, page 256) provided that any portion of said fund remaining unexpended on January 1 next after the end of the fiscal year should be covered into the State Treasury to the credit of the General Fund.

I am advised that, after the rendition of this opinion, the same was followed by the administrative officers charged with the administration of the Department of Commerce and other officials with duties in the premises; and that the special fund created for the maintenance of the office of the State Fire Marshal, and the payment of the expenses incident thereto, was consolidated with the appropriations and funds accruing to the various bureaus, boards, and departments then constituting and composing the Department of Commerce, and used to pay the salaries and defray the expenses of the Department of Commerce generally, until the passage of Act No. 379, General Acts 1939, page 505 (Title 55, Section 28, Code of Alabama 1940). This Act provided that all moneys accruing to or collected by or through the Department of Commerce, or any bureau or division thereof, or as a result of any statute which said Department of Commerce, or any bureau or division thereof, might be charged with the duty of administering should, when collected, be covered into the State Treasury to the credit of the General Fund. Since the passage of Act No. 379, supra, it appears that there has been no special fund for the maintenance of the office of the State Fire Marshal, and the payment of the expenses incident thereto.

An opinion of the Attorney General affords protection to any public official who acts in accordance therewith, although not addressed directly to such officials. Quarterly Report of Attorney General, Vol. 1, page 276; opinion to you under date of September 30, 1948.

After a careful reading of the opinion hereinabove cited, I can see how the Director of Commerce, and other administrative officials with duties in the premises, might have construed the same as authority for the procedure or procedures which I have herein held to be improper. However, to prevent any further misconstruction of this opinion by anyone, you are advised that it only applied to appropriations and funds accruing to the various bureaus, boards, and departments which then constituted and composed the Department of Commerce, and that it has no present application. In this situation, it becomes unnecessary to consider the legal correctness vel non of said opinion.

While it has no bearing on the questions presented by your inquiries, since all of the expenditures referred to in your request were made during the fiscal year commencing October 1, 1946, and ending

September 30, 1947, I call your attention to the fact that Section 6 of Act No. 159, supra, was amended by Act No. 124, General Acts 1947, page 36, and that Section 4 of Act No. 118, supra, was amended by Act No. 125, General Acts 1947, page 37. Consequently, these sections, as amended, rather than the original sections as quoted in the opinion are presently applicable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 17, 1949.

Hon. Wiley C. Allen,
Superintendent of Education,
Choctaw County,
Butler, Alabama.

Teachers — Schools — County Boards of Education — County Superintendents of Education.

1. The word "teacher," as used in the Teacher Tenure Act, includes the principal of a high school and the principal of an elementary school.

2. The principal of a high school, who has acquired tenure, upon being transferred must be transferred to a similar position, school, or grade, and, therefore, must be transferred to another high school in the capacity of principal. If there be only one high school in the county, no transfer of such principal is possible unless the principal voluntarily accepts transfer to an elementary school.

3. A tenure teacher may, by mutual agreement terminating his or her contract or by voluntary acceptance of transfer to a lower position, school, or grade, waive rights acquired under the Teacher Tenure Act, but no waiver can be implied unless such teacher has full knowledge of his or her acquired rights and acts without coercion.

4. Tenure teachers may upon the superintendent's recommendation be transferred at will, by the employing board of education, provided they be transferred to a similar position, school, or grade, and without demotion in pay.

5. The employment, assignment, transfer, suspension, and dismissal of tenure teachers, including instructors, principals, and supervisors, is governed entirely by the provisions of the Teacher Tenure Act of 1939.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 22, 1948, is as follows:

"I am writing to you in regard to a question and answer which you gave in a bulletin addressed to Hon. Dayton Robinson at Grove Hill, Alabama, on August 4, 1948. The question that I want clarified is #9 in regard to the transfer of a teacher on continuing service status.

"In addition to the questions asked in #9, I want to add to those questions the following questions:

"1. Does the use of the word teacher include the Principal of a High School and Principal of an Elementary School?

"2. Can a high school principal on continuing service status be transferred to an elementary school as principal or does he have to be transferred to a similar high school? Suppose you do not have a similar high school in your county?

"3. If a principal of a high school has signed a contract in which he has agreed to give up his duties at that school as principal at the end of a school year, then what responsibility is this Board due this person for future employment in this county?

"4. Does this Board have to employ every teacher and every principal who are on continuing service status in the job that they want regardless of the job which they are doing or does this Board have the right to employ teachers and principals and to assign them to schools where they think it will be for the best interest of the students?

"5. Does a teacher or principal have the right to demand that they be re-employed where they want to remain, even for the rest of their life?

"6. Can the County Superintendent of Education and Board Members carry out the responsibility which is given them as stated in the Alabama School Code 1940, Title 52, Section 123, or do they have to follow some other law?"

1. Your first question is answered in the affirmative. Title 52, Section 351, Code of Alabama 1940, states that the term "teacher," as used in the Teacher Tenure Act of 1939, includes "all persons regularly certificated by the teacher certificating authority of the State of Ala-

bama, who may be employed as instructors, principals or supervisors in the public elementary and high schools of the State of Alabama."

2. Your second question is answered in the negative. As pointed out in former opinions, the purpose of the Teacher Tenure Act of 1939 is to protect the teacher, be he or she instructor, principal, or supervisor, in his or her attained position, provided such person be efficient, competent, and worthy. See, for example, opinion rendered the Honorable Dayton Robinson, Superintendent of Education of Clarke County, on August 4, 1948. As there explained, the unlawful demotion of a teacher can be equivalent to discharge, citing **State ex rel. Bass v. Vernon Parish School Board** (La. App.), 194 So. 74. It is common knowledge that the experience requirements, pay scale, and professional standards and responsibilities generally are higher for teachers in high schools than for teachers in elementary schools. To a greater extent the same is true as to principals, whose authority, professional attainments, and scope of employment are greater. In my opinion the Teacher Tenure Law guarantees that a tenure teacher can maintain the highest status as teacher which such teacher has attained, unless removed for cause after notice and hearing.

In my judgment the principal of a high school, who by faithful and satisfactory service for the required period has attained tenure status, from a professional standpoint and salary considerations aside, has attained a higher status than a tenure principal of an elementary school. Therefore, it cannot be said that the transfer of a tenure principal of a high school to the position of principal of an elementary school is a transfer to "a similar position, school, or grade." If, in the county, there is no other high school, and if the tenure principal refuses to accept transfer to an elementary school, even though such transfer be without demotion in pay, in my opinion no transfer is possible and the tenure principal must be allowed to remain in his or her position as principal of the high school, subject always to the qualification that any tenure teacher, instructor, principal, or supervisor can be removed for cause after notice and opportunity to be heard.

3. The answer to your third question depends upon whether such principal is a probationary principal or a tenure principal. An employing board of education can summarily terminate the employment of a probationary teacher at the expiration of the period covered by the contract, usually a year. **Whittington v. Barbour County Board of Education,** 250 Ala. 692, 36 So. 2d 83. But the contract of a tenure teacher remains in full force and effect until the parties enter into a new contract or the existing contract is cancelled because of the existence of one of the grounds set out in Section 356, **infra,** and in strict compliance with the procedural requirements of Section 357, **infra. State ex rel. Maenetta Steele v. Board of Education, Etc., infra.** The Teacher Tenure Act of 1939 was adopted for the security of the teachers of this state. See **Board of Education v. Baugh,** 240 Ala. 391, 199 So. 822. Tenure rights acquired by a teacher under the Act may, however, be waived. See, for example,

Title 52, Section 359, Code of Alabama 1940, which provides for cancellation of a teacher's contract by mutual agreement. While under the Act a tenure teacher may, upon being transferred, assert his or her right to be transferred to a similar, though not identical, position, school, or grade, nothing in the Act requires tenure teachers to assert that right. The Act does not prohibit the teacher, by mutual agreement, from accepting transfer to a lower position, school, or grade. Conceivably a tenure principal might recognize his or her lack of administrative ability or for other sufficient reason, personal or otherwise, voluntarily request or consent to demotion as to pay or responsibility by reverting to the position of teacher. The reasons which may prompt a waiver of rights are varied. Whether a tenure principal, in signing a yearly contract in which such principal agrees to relinquish his or her principalship at the end of the year, does so voluntarily and with full knowledge of his or her rights under the law, is a question of fact to be decided in each individual case. In my judgment, that type of contract cannot be uesd as a means of coercion or to defeat rights which have become vested under the Act. So the answer to your third question depends upon what rights the principal, with full knowledge of his or her rights, wishes to assert.

4. Nothing in the Act requires that the employing board of education employ a tenure teacher necessarily in the job that he or she wants and regardless of the position, school or grade which he or she holds. Title 52, Section 355, Code of Alabama 1940, leaves the matter of transfer of tenure teachers to the sound judgment and discretion of the superintendent and the employing board of education, which it is assumed will balance the best interests of the students against the best interests of the teachers, and endeavor to adjust each to the other. The answer to your fourth question is, therefore, that tenure teachers may be transferred at will by the employing board of education, upon recommendation of the superintendent, the sole limitations being that they must be transferred to similar positions, schools, or grades, and without demotion in pay. Tenure teachers are not guaranteed the right to teach in particular schools or to teach particular classes and may be transferred so long as the work assigned is of rank and grade equivalent to that by which tenure status was acquired and so long as the assignment is one for which such teachers are qualified.

5. The answer to your fifth question will be found under No. 4, supra.

6. The answer to your sixth and last question is found in the express language of Title 52, Section 123, Code of Alabama 1940, the closing words of which are: "subject to the provisions of chapter 13 of this title." Chapter 13 is the codification of the Teacher Tenure Act of 1939. See Title 52, Sections 351-361, Code of Alabama 1940, as amended by Act No. 313, General Acts 1943, Page 300, and Acts Nos. 410 and 411, General Acts 1945, Page 646. Therefore, where a tenure teacher is involved, the superintendent of education and the employing board of education, in seeking to discharge their responsibilities imposed by Section 123, supra, are governed by the provisions, in toto, of the

Teacher Tenure Act of 1939, as amended, enactment of which created two classes of teachers, to-wit, tenure teachers and probationary teachers. See **State ex rel. Maenetta Steele v. Board of Education, Etc.**, Ala. Ms., February 17, 1949, 6 Div. 732. The contract of a tenure teacher can be cancelled only in the manner provided by Section 357, infra, while termination of a probationary teacher's employment is governed by Title 52, Section 360, Code of Alabama 1940, as amended.

In my judgment the Teacher Tenure Act of 1939 contributes to, rather than detracts from efficient administration of the public school system. It may be argued that the Act tends toward permanent entrenchment of inefficient and incompetent teachers, instructors, principals, and supervisors. Such is not the case, since the Act contains provision for removal for cause after notice and opportunity to be heard. See Title 52, Sections 145 and 356, Code of Alabama 1940. A teacher, instructor, principal or supervisor, for example, can be competent in a low grade, where young pupils are taught, but incompetent in a higher grade, for older and more advanced students, especially where government and discipline, involving exercise of executive ability, are required. While there may arise instances in which the best interests of the schools require the reassignment of a teacher promoted to a higher grade, if such reassignment operates as a demotion it can be done only for cause and after notice to the teacher, instructor, principal or supervisor and opportunity to be heard, as in manner provided by Title 52, Section 357, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 20, 1949.

Hon. A. A. Pate,
Sheriff,
Calhoun County,
Anniston, Alabama.

Counties—Employees—Hospital Expenses—Insurance.

1. No authority is vested in the governing body of the county to expend county funds in payment of hospital or medical expenses incurred by employees injured while in the performance of their duties merely because of the existing employer-employee relationship.

2. A county governing body is authorized to expend county funds in payment of such expenses only in the event such employed persons are "unable to provide for themselves." Title 22, Section 190, Code of Alabama 1940.

3. The governing body of any county may, in its discretion, under the provisions of Acts No. 208 and 376, General Acts 1947, pages 69 and 267, establish a group insurance plan for the officers and employees of the county subject thereto, and may pay all or any part of the premiums thereon.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of March 15, 1949, is as follows:

"I would like your ruling concerning the following case:

"One of our deputies was on a trip out of the state on official business when he had an accident in which he suffered a broken hand. There was, of course, several bills including Doctor and X-ray. We would like to know if the County Commission should be responsible for this bill or if our deputy must be responsible himself.

"I would also like to know if the County Commission is authorized and required to carry insurance on the deputies."

In answer to your first inquiry, I would advise that it is my opinion that the county governing body would be authorized to expend county funds in payment of the expenses therein mentioned only in the event that such person was unable to provide such services for himself.

It has long been established in this State that counties are governmental agencies of the State, having only such powers as are granted to them by the Legislature, and may not expend public funds unless there is a statute authorizing such expenditure. **Naftel v. County of Montgomery**, 127 Ala. 563, 29 So. 29; **Board of Revenue and Road Commissioners of Mobile County v. State ex rel. Dragp**, 172 Ala. 155, 54 So. 995; **State ex rel. Towle v. Stone, County Treasurer**, 236 Ala. 82, 181 So. 218; Quarterly Report of Attorney General, Volume 9, page 35; Volume 39, page 97; Volume 35, page 19; Volume 47, page 170.

Considering the statutes of this State pertaining to the authority and jurisdiction of county governing bodies, I find nothing therein authorizing, either directly or by implication, the expenditure of public monies of the county in payment of the hospital or medical expenses of an injured employee of the county merely because the injured person was, or is, an employee of the county and was injured in the line and scope of his duty. Biennial Report of Attorney General, 1936-38, page 170; Quarterly Report of Attorney General, Volume 3, page 44; Quarterly Report of Attorney General, Volume 6, page 28.

The provisions of Act No. 185, Local Acts 1947, page 101, show conclusively that those persons serving as deputy sheriffs of Calhoun County are nothing more than employees of the county, Section 3 thereof providing for their appointment by the sheriff and the payment of their compensation by the county.

However, a county is authorized, under certain conditions, to pay the hospital expenses of an employee who is injured in line of duty. This right to pay such expenses does not grow out of the relation of employer and employee, but is one authorized by Title 22, Section 190, Code of Alabama 1940. The provisions of this statute are as follows:

> "The governing body of any county or city in this state may make an appropriation or appropriations out of their respective treasuries to aid in maintaining and taking care of sick and wounded persons who are unable to provide for themselves in any hospital maintained for the care of the sick and wounded. Any county or city owned or controlled hospital may accept patients from any county or city."

This section specifically provides that only those "who are unable to provide for themselves," may receive the benefits provided for by this section. The question of fact, therefore, arising is one which this office is neither competent nor authorized to determine, but is one which addresses itself to the sound discretion of the county governing body. However, it is apparent that the authority of the county governing body to pay the hospital expenses of this injured employee is dependent upon the financial ability of such employee to pay his own expenses. The question of the financial condition of the employee is a question of fact for the determination of the county governing body.

Regarding your second inquiry, I would call your attention to the provisions of Acts No. 208 and 376, General Acts 1947, pages 69 and 267, respectively. These two acts are identical in form and verbiage and provide, among other things, that the governing body of any county may contract for and obtain and maintain policies of group life, health, accident and hospitalization insurance for the benefit of such of the officers and employees of the county as may be determined by the governing body, and as shall elect to accept such insurance, subject, of course, to the provisions and conditions of such acts. It is further provided by Section 3 of each of such acts that the county governing body shall have authority to pay all or such part of the premiums of such insurance as the governing body may determine.

In answer to your inquiry, I would, therefore, advise that it is my opinion that, subject to the provisions of the acts cited above, the county may establish a group insurance plan as therein provided for and may include therein the deputy sheriffs of the county. However, it is

not mandatory, nor is the governing body of any county required, to establish such a group insurance plan.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 20, 1949.

Honorable A. R. Meadows,
Superintendent of Education,
State Department of Education,
CAPITOL.

Courts of County Commissioners—Schools.

County governing bodies are authorized to make appropriations to county boards of education for the construction of post treating plants to be used as a part of vocational education courses by authority of Title 52, Section 388, Code of Alabama 1940.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of April 6, 1949, is as follows:

"The State Board of Education recognizes post treating plants located on high school grounds as an integral part of the facilities in the high school for giving instruction in vocational agriculture in the same manner as they recognize all other shop and laboratory facilities for such purposes. In light of this fact your answer to the following question is requested:

"Is it legal for boards of revenue and courts of county commissioners of counties in Alabama to make appropriations to county boards of education to be used in the cnstruction of post treating plants that are to be used as a part of vocational educational courses, in centers approved by the State Board of Education in accordance with Section 388, Title 52, Code of Alabama 1940, in instructing farmers to treat posts and in treating the posts of farmers who bring or send posts which they are going to use on their farms to such plants for treatment?"

Title 52, Section 388, Code of Alabama 1940, provides as follows:

> "§ 388. County and city may make appropriation for Smith-Hughes type of vocational training.—Boards of revenue and courts of county commissioners of counties of Alabama are hereby authorized to make appropriations to county boards of education to be used in providing classrooms, laboratories, and shops for use in teaching vocational subjects, and for maintaining such vocational departments after they have been established; provided that such appropriations may only be made for use in any school or schools duly recognized by the state board of education as centers for vocational instruction of the Smith-Hughes type, and on account of which reimbursement is being made or is to be made during the next fiscal school year following the first payment of county funds appropriated for such purposes."

It is my opinion that a post treating plant is a laboratory or shop as contemplated by this section.

In quarterly Report of Attorney General, Volume 39, page 8, there is found an opinion, which holds that county governing bodies may appropriate funds to provide canning plants under authority of the above quoted section. I quote from a portion of that opinion:

> "I am of opinion that your question should be answered in the affirmative, provided the 'canning plants' to which you refer are used exclusively as 'vocational education laboratories,' are under the exclusive operation, management and control of the school authorities, and are not operated for commercial purposes or in competition with private enterprises."

I assume from the wording of your inquiry that the purpose for establishing these post treating plants is for training students in the various processes and methods of treating posts. So long as the proposed treating plants are under the operation, management, and control of school authorities, and are not operated for commercial purposes or in competition with private enterprise, I see no reason why the county governing body could not legally appropriate money for their establishment.

A somewhat similar plan was submitted to this office for an opinion in 1947. Quarterly Report of Attorney General, Volume 48, page 37. That opinion held that the county was not authorized to appropriate funds for a creosoting plant for the public under the supervision of vocational classes. In that instance the ostensible use of the proposed plant was for the public and not for vocational training. It is my opinion that this former opinion can be distinguished for that reason, and, therefore, need not be overruled.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 24, 1949.

Hon. David E. Dunn, President,
Board of Revenue,
Montgomery County,
Montgomery, Alabama.

Counties—Water.

A county governing body may donate a sum of money to the Alabama-Coosa Rivers Improvement Association for the purpose of developing the water resources of the county under Title 12, Section 12(22), Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of April 29, 1949, is as follows:

"The Board of Revenue of Montgomery County requests your official opinion on the following question:

"May the Board donate a sum of money to the Alabama-Coosa Rivers Improvement Association? This association, as you perhaps know, is interested in developing the Alabama River. One of the objects of the association is to do everything it can to foster the development and improvement of the Alabama River Channel, including that part of the river that comes through Montgomery County, so as to make the river navigable."

I am of the opinion that your inquiry should be answered in the affirmative. Title 12, Section 12(22), Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, in referring to the authority of county governing bodies, provides, in part, as follows:

"The court has authority: * * * 22. To set aside, appropriate and use county funds or revenues, for the purpose of developing, * * * * water, * * * and all other resources of every kind of their respective counties, * * *."

The purpose of the Alabama-Coosa Rivers Improvement Association, as outlined in your request, is to develop and improve the Alabama River channel, including that part of the river that comes through Montgomery County. It is my opinion that, as authorized by Title 12, supra, you may aid in the development of the water resources of the county by the donation of a sum of money to this Association.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 26, 1949.

Honorable J. G. Kramer,
City Clerk,
City of Cullman,
Cullman, Alabama.

Municipality—Schools.

The exception "for the purpose of acquiring, providing, or constructing school houses," as used in that portion of Section 225 of the Constitution of Alabama of 1901, relating to the constitutional debt limit of municipalities of six thousand population or more, does not necessarily contemplate that title to the school houses be vested in the municipality involved, provided such school is located within the municipality and its inhabitants receive benefits therefrom.

Opinon by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 13, 1949, is as follows:

"At the last meeting of the Mayor and Council of the City of Cullman a resolution was adopted by said body instructing and directing me as City Clerk to obtain from you an official opinion on the following facts and questions.

"The Cullman County High School property is vested in the State of Alabama. It is located in the City of Cullman. The administration of said school is under the direction of the County Board of Education. The County Board of Education in the operation and administration of said school has incurred, along with the operation of other schools in the county, considerable indebtedness, represented by school warrants, etc. The Mayor and Council and the City Board of Education have negotiated with the County Board of Education to the end that the Cullman County High School administration may be taken over by the City Board of Education of Cullman. It is the wish of Dr. Meadows and his board that title to the property remain in the State. A condition has been placed on the transfer of the administration from the County Board of Education to the City Board of Education, that the Mayor and Council, on behalf of the City, assume to pay to the County Board of Education the sum of $40,000.00, representing the allotted amount of the County Board of Education's indebtedness against this institution. This arrangement is satisfactory to all three public bodies, that is, the County Board of Education, the City Board of Education, and the Mayor and Council. The question arises, however,

under the provisions of Section 225 of the Constitution of Alabama of 1901, namely, whether or not the city of Cullman could legally become indebted for such purposes without actually obtaining title to the properties. In other words, can the City of Cullman become indebted in the sum of $40,000.00 to the County Board of Education in order to provide a school facility, that is, the Cullman County High School properties, for the use and benefit of the children under the jurisdiction of the City Board of Education of Cullman.

"For your information, under an enumeration held under the State statute last year, the City of Cullman has a population in excess of six thousand people, and such enumeration is certified to the Secretary of State of Alabama and is of record in such office. As to cities of more than six thousand, it seems that the limitations of indebtedness shall not apply to obligations already issued or which may hereafter be issued for the purpose of **acquiring, providing, or constructing school houses.** It is true that under the arrangement contemplated the City of Cullman would not acquire or construct a school house, but they would in a sense be providing a school for the use and benefit of the children of school age of said city, and we would like to know if it can incur an indebtedness in order to acquire the use of the Cullman County High School properties, title of which is in the State of Alabama, administration of which is now in the County Board of Education, and which indebtedness represents moneys spent by the County Board of Education on the buildings of said school and which will hereafter be used and administered by the City Board of Education under this arrangement."

In answer to your inquiry, it is my opinion that the incurring of the indebtedness by the City of Cullman in the manner and for the purpose set out therein, if otherwise legal, does not violate Section 225 of the Constitution of Alabama 1901, since the transaction comes within the exception of said constitutional provision relative to municipalities of six thousand population or more "acquiring, providing, or constructing school houses."

Section 225 of the Constitution of 1901 provides in pertinent part as follows:

"All towns and cities having a population of six thousand or more, also Gadsden, Ensley, Decatur, and New Decatur, are hereby authorized to become indebted in an amount including present indebtedness, not exceeding seven per centum of the assessed valuation of the property therein, provided that there shall not be included in the limitation of the indebtedness of such last described cities and towns the following classes of indebtedness, to-wit: Temporary loans, to be paid within one year, made in anticipation of the collection of taxes, and not exceeding one-fourth of the general revenues, bonds, or other obligations already issued, or which may hereafter be issued for the purpose of acquiring, providing, or constructing school houses, water works, and sewers; * * * *"

Before discussing your main inquiry, your attention is invited to the case of **Ryan v. Tuscaloosa**, 155 Ala. 479, 46 So. 638, which holds it is evident that, in omitting mention of the federal census in this section, a clear intent is manifested to leave the ascertainment, upon occasion, of the population to means properly serveiceable to that end. It follows, from the facts set out in your inquiry, that the City of Cullman is now within such classification of municipalities of six thousand population or more and is subject to the above quoted portion of Section 225 of the Constitution, supra.

This brings to consideration an interpretation of that portion of the above quoted part of Section 225, supra, "for the purpose of acquiring, providing, or constructing school houses." Does this proviso necessarily contemplate that title to the school houses, which are acquired, provided, or constructed, be vested in the municipality involved? In my opinion, it does not.

Our Supreme Court, in the case of **Carey v. City of Haleyville**, 230 Ala. 401, 161 So. 496, held that under the statute authorizing a municipality to issue bonds to construct school houses, the municipality could issue bonds to pay one-half of cost of school building to be erected in the municipality, and to be opened for pupils from the entire school district of which the municipality was a part, notwithstanding that the municipality would not have title to the school, and that the school would be controlled by the county board. This case has been subsequently followed in the cases of **First National Bank of Birmingham v. Walker County Board of Education**, 243 Ala. 576, 11 So. 2d. 297; and **State ex rel Austin v. City of Mobile**, et al., 248 Ala. 432, 28 So. 2d. 177.

Reasoning by analogy, based on our Supreme Court decisions, it is my judgment that the words "for the purpose of acquiring, providing, or constructing school houses," as used in the above quoted portion of Section 225, supra, do not necessarily contemplate ownership by the municipality involved. As stated in the case of **Carey v. City of Huntsville**, supra, "No sound reason appears why such municipalities may not devote surplus proceeds of revenue for the erection and maintenance of such schools located within their corporate limits. The inhabitants receive the benefits, though along with others in territory surrounding."

In the instant transaction, although the title to school building is and will remain in the State of Alabama, and the administration of the school will be under the City Board of Education, the City of Cullman is in a position tantamount to acquiring, providing, or constructing the school building within the exception of the above quoted portion of Section 225 of the Constitution, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 30, 1949.

Hon. J. M. Schnell, Chairman,
Board of Registrars,
Mobile County,
Courthouse,
Mobile, Alabama.

Boards of Registrars—Mobile County—Purging of Registration List.

1. The registration list of Mobile County should be purged in the manner prescribed by Title 17, Sections 44, 46 and 48, Code of Alabama 1940, except where the provisions of such statutes are in conflict with the provisions of Act No. 454, General Acts 1935, page 981 (Title 62, Section 37, Code of Alabama 1940), in which case the provisions of the latter will control.

2. The expense incurred in issuing the notices and causing to be made the publication required by Title 17, Section 46, Code of Alabama 1940, is to be paid by the State, the bills therefor to be rendered to the Director of Finance and approved by him. Title 17, Section 37, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 5, 1949, is as follows:

"Will you give us your considered opinion at your earliest convenience as to the legal procedure or method of purging the registered list of electors of persons suspected of being nonresidents in Mobile County.

"The Act of 1935 under which the Mobile County Board of Registrars operates stipulates only the date and length of the purging and hearing session with no instruction as to method. In a county with the population of Mobile containing a county seat which is the largest seaport of the state it is inevitable that the lists of electors, forty-eight years after the general registration, should contain a large percentage of names of persons, whose present residential status is virtually unobtainable.

"That these lists be purged adequately and disencumbered of this significant percentage of inactive electors is the earnest desire of this Board.

"In the event that your opinion should involve legal notification by the Sheriff of Mobile County or publication in the local press, will you please advise whether the Secretary of State is authorized to absorb the expense of such procedure, whereas there is no budgetary provision for any expenditure on the part of the Boards of Registrars.

"We earnestly request that you favor us with this opinion so that the advice contained therein may be incorporated in the present purging session, which commences as of this date."

In my judgment, the purging of the registration list of Mobile County by the Board of Registrars thereof should be conducted pursuant to the provisions of Title 17, Sections 44 and 46, Code of Alabama 1940, except where the provisions of such statutes are in conflict with the provisions of Act No. 454, General Acts 1935, page 981 (Title 62, Section 37, Code of Alabama 1940), in which case the provisions of the latter would be controlling.

The general law of the State relative to the method of procedure to be used in the purging of the registration lists of the various counties is to be found set out within Title 17, Sections 44 and 46, supra. These statutory provisions are as follows:

"§ 44. The board of registrars shall meet in each county on the first Monday in January, 1940, and every two years thereafter, for purging the registration list, and may continue in session one week. The names of those who have died, become non-residents of the state, become insane, and been so declared by inquisition of lunacy, or who have been convicted of any offense mentioned in section 182 of the constitution, since being registered, or otherwise disqualified as electors under the provision of the constitution, and any names which may have been fraudulently entered on such list, shall be stricken from the registration list. Any member of the board of registrars who neglects or wilfully refuses to perform the duties herein required of him shall be guilty of a misdemeanor and on conviction, shall be punished by a fine of not more than five hundred dollars and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months. When said board of registrars have sufficient evidence furnished them that any elector has permanently moved from one precinct to another in any county said board of registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved."

"§ 46. When the name of any elector is proposed to be stricken from the registration list, unless he or she is dead or is a non-resident of the state, notice shall be issued to him or her by the board of registrars, citing him or her to appear before the board on the second Monday in February, following, and show cause why

his or her name should not be stricken from the list. Said notice shall be served by the sheriff at least five days before the second Monday in February. The board of registrars shall in addition to the above notice give notice in some newspaper published in the county by one insertion."

By Act No. 454, General Acts 1935, page 981, now codified as Title 62, Section 37, Code of Alabama 1940, the Legislature enacted separate provisions of law relative to the registration of voters and purging of the registration list, which provisions are applicable to Mobile County alone . These are as follows:

"§ 37. The board of registrars shall meet at the courthouse on the first day of each October and hold daily sessions, Sundays and legal holidays excepted, from and including said date through the succeeding February first, for the purpose of registering voters. Said board shall also meet on the first Monday of April of each year and remain in session daily for thirty days, Sundays and legal holidays excepted, for the purpose of purging the registration list and shall again meet each year on the first Monday after the expiration of one week from the expiration of said last mentioned session and shall remain in session daily for six days for the purpose of hearing objections to striking names from registration lists. Said sessions of the board of registrars in said county shall be in lieu of all other sesions now authorized by law."

That such provisions, rather than the general law, have application within Mobile County is definitely settled by the decision of the Supreme Court in the case of **State ex rel. Harrington v. Randle, 250** Ala. 472, 35 So. 2d 84. It has likewise been concluded in two former opinions of this office that the periods and purposes of meetings of the Board of Registrars of Mobile County, provided for by Act No. 454, supra, constitute the only meetings by the said Board for the purposes now contemplated by law. Quarterly Report of Attorney General, Volume 3, page 197; Quarterly Report of Attorney General, Volume 19, page 16.

Likewise, the two opinions cited above construe the provisions of Act No. 454, supra, in conjunction with what is now Title 17, Section 44, supra, and in each instance it is concluded that the latter is a general law applicable to every county in the State not otherwise excepted therefrom. Furthermore, that the provisions of such statute are applicable to Mobile County in all parts except where a direct conflict with Act No. 454, supra, exists, in which case, the provisions of Act No. 454, supra, prevail. In my opinion, for the same reasons heretofore pointed out, and as found stated in detail in the former opinions above referred to, the same would be true with reference to Title 17, Section 46, supra. Here, as in the former instance, the provisions of such statute would be applicable to Mobile County except where in direct conflict with the provisions of Act No. 454, supra.

The material difference between the provisions of Title 17, Sections 44 and 46, supra, and those of Act No. 454, supra, lies in the fact that different dates as well as periods of time are prescribed by Act No. 454, both for the registration of voters, purging of the registration list and the hearing of objections by those proposed to be purged from such list. As I have above indicated, it is my opinion that the provisions of Act No. 454, supra, are controlling in this regard, and that the sessions of the Board for all of the above purposes should be held in conformity therewith. It, therefore, follows that the Board of Registrars of Mobile County should meet upon the first Monday in April of each year and remain in session daily for thirty days, Sundays and legal holidays excepted, for the purpose of purging the registration list, and that such Board should again meet each year on the first Monday after the expiration of one week from the termination of said purging session and remain in session for six days for the purpose of hearing objections by those proposed to be purged from such registration list.

As to the conduct of such hearings and the records to be kept by the Board of Registrars as to the names so purged, I call your attention to the provisions of Title 17, Sections 48 and 49, Code of Alabama 1940.

Regarding your inquiry as to the giving of notice to those persons whose names are proposed to be stricken from the registration list, I would advise that it is my opinion that the provisions of Title 17, Section 46, supra, are applicable except where in direct conflict with Act No. 454, supra, and as such conflict relates only to the dates upon which said session is to be held and the period for which it is to continue, it is my judgment that notice should issue to those concerned at least five days prior to the date set for the hearing of objections, which date is to be set pursuant to the provisions of Act No. 454, supra. Quarterly Report of Attorney General, Volume 3, page 197. Likewise, that the publication required by this statute should be made.

In answer to your last inquiry concerning the payment of the expenses incurred in issuing the notices and causing to be made the publication provided for by Title 17, Section 46, supra, it is my opinion that such expense is to be paid by the State with the bills therefor to be rendered to the Director of Finance and approved by him. Such are the provisions of Title 17, Section 37, supra, wherein it is provided, in pertinent part, that:

> "* * * The cause of the publication of the notices required to be given by the registrars shall be paid by the state, the bills therefor to be rendered to the director of finance and approved by him."

The notices and publication issued and made under the provisions of Title 17, Section 46, supra, being such as are "required to be given by the registrars," it is my opinion that the expense occasioned thereby should be paid by the State of Alabama pursuant to the above-quoted statute, governed in amount by the provisions of Title 11, Section 34,

Code of Alabama 1940, as to the fees of the sheriff and by the provisions of Title 7, Section 718, Code of Alabama 1940, as to the cost of publication of the notices required. Biennial Report of Attorney General, 1932-34, page 262; Quarterly Report of Attorney General, Volume 10, page 69.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 30, 1949.

Hon. Bankhead Bates, Director,
Department of Public Safety,
CAPITOL.

Motor Vehicles—Trailers—Highways and Highway Department.

1. Since under present law a house-trailer is neither trailer nor semi-trailer, no limit exists upon the number of house-trailers which may be coupled to the towing vehicle nor upon the overall length of such combination.

2. The Attorney General recommends that the Rules of the Road as expressed in Title 36, Sections 1-58, Code of Alabama 1940, be amended so as to prohibit a combination of more than two vehicles and to restrict the overall length of such combination to 50 feet.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of May 4, 1949, is as follows:

"Under Title 36, Article 2, Section 89 of the Code of Alabama 1940, as amended 1943, in the Legislative session and approved June 17, 1943, it is provided: 'No vehicle shall exceed in length thirty-five feet except that the length of semi-trailer trucks, including any part of the body or load, shall not exceed forty-five feet.'

"Under Title 36, Chapter 1, (i) of the 1940 Code of Alabama it is provided under definition as follows: 'Semi-trailer.' 'Means a vehicle designed to be attached to, and having its front end supported by, a motor truck or truck tractor, and intended for the carrying of freight or merchandise and with a load capacity of over one thousand pounds.'

"Will you please advise us if a house trailer towed by an automobile or truck falls within the scope of the definition for a semi-trailer and if said house trailer towed by an automobile or motor truck is limited in anyway as to length under the above named Act."

Title 36, Section 89, Code of Alabama 1940, as amended by Act No. 179, General Acts 1943, page 159, prescribing limitations on size and weight of vehicles and loads, provides in part:

"(c) Length. No vehicle shall exceed in length thirty-five feet except that the length of semi-trailer trucks, including any part of the body or load, shall not exceed forty-five feet . . . ."

Title 36, Section 1, Code of Alabama 1940, defining words and phrases used in Title 36, defines "semi-trailer truck" as "any motor-propelled vehicle, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor-propelled vehicle), together with the semi-trailer shall be considered one unit, and the words 'semi-trailer truck' as used in this title shall mean and embrace such entire unit."

Section 1, supra, with supplied emphasis, defines "semi-trailer" as "a vehicle designed to be attached to, and having its front end supported by, a motor truck, or truck tractor, and **intended for the carrying of freight or merchandise** and with a load capacity of over one thousand pounds."

Section 1, supra, with supplied emphasis, defines "trailer" as "any vehicle designed to be drawn by a motor truck or truck-tractor, but supported wholly upon its own wheels, and **intended for the carriage of freight or merchandise** and with a load capacity of over one thousand pounds."

Title 36, Section 80, Code of Alabama 1940, as amended by Act No. 690, General Acts 1947, page 526, prohibits the operation of any trailer, as above defined, on any highway of this state. An exception, not here material, is made should the trailer be operated for highway construction purposes under special permit.

In construing the said definition of "trailer," it has been ruled that a house-trailer, boat-trailer, or other trailer designed for towage by a passenger motor vehicle, is not a "trailer" within the meaning of Section 80, supra, such conclusion being reached upon the dual ground that such house-trailer, boat-trailer, or other trailer is not primarily intended for the carriage of freight or merchandise, and is not designed to be drawn by a motor truck or truck tractor. See Quarterly Report of Attorney General, Voy. 3, page 213, and Quarterly Report of Attorney General, Vol. 7, page 250.

While I concede that house-trailers are commonly of two types, 2-wheeled and 4-wheeled, and that in use of the 2-wheeled type a part of the load is supported by the towing vehicle, nevertheless a 2-wheeled trailer could not be classified as a semi-trailer even though drawn by a motor truck or truck tractor, because not primarily intended for the carriage of freight or merchandise. A fortiori a 4-wheeled house-trailer could not be so classified. Cf. Title 51, Section 703, Code of Alabama 1940, and Quarterly Report of Attorney General, Vol. 28, page 162; also, Quarterly Report of Attorney General, Vol. 52, page 206.

Except as may be inferred from Section 80, supra, and Title 36, Section 81, Code of Alabama 1940, our state has no law which prohibits the operation of more than two motor vehicle units coupled together, nor which designates the permissible overall length of a combination of vehicles. I regard the present law as deficient in this respect and, pursuant to statutory duty (see Title 55, Section 228, Code of Alabama 1940), I recommend that existing law be amended to conform to Paragraph (C) of Section 172, of Act V, entitled a "Uniform Act Regulating Traffic on Highways," of the Uniform Vehicle Code (1948 revision) sponsored by the National Highway Users Conference. Section 172, supra, prohibits the coupling of more than two units and restricts the overall length of a combination of vehicles to 50 feet.

Both halves of your question are, therefore, answered in the negative, since under present law a house-trailer is neither a trailer nor semi-trailer, and no limit exists upon the number of house-trailers that can be coupled to the towing vehicle nor upon the overall length of such combination.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 31, 1949.

Hon. Douglas C. Martinson,
Judge, Inferior Court,
Huntsville, Alabama.

Madison County—Inferior Courts—Costs and Fees—Committing Magistrates—Statutes—Preliminary Trials.

1. The judge of the Inferior Court of Huntsville, in holding peace proceedings under Title 15, Section 399, et seq., Code of Alabama 1940, and in holding preliminary examinations under Title 15, Section 128, et seq., Code of Alabama 1940, is sitting as a magistrate and not as a court.

2. Costs and fees collected in peace proceedings and as a result of preliminary examinations by the judge of the Inferior Court of Huntsville must be paid into the county treasury.

3. The legal fees to which the judge of the Inferior Court of Huntsville is entitled in peace proceedings are those fees enumerated in the regular schedule of fees for justices of the peace in Title 11, Section 96, Code of Alabama 1940.

4. Peace proceedings and preliminary examinations conducted by the judge of the Inferior Court of Huntsville should be entered on his regular criminal docket, and not on a special docket.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 28, 1949, is as follows:

"I have several questions which have recently been brought to my attention and would like your ruling upon same. They are as follows:

"The Judge of the Inferior Court of Huntsville is elected by the people and is paid a salary of one hundred fifty dollars ($150.00) a month and a clerk for said Court is appointed and paid a salary of one hundred dollars ($100.00) a month. The county provides office space and supplies up to and including twenty-five dollars ($25) a month.

"1. Section 399, Title 15 Code of Alabama sets out who are magistrates within the purview of Article 1 Conservators of the Peace and Magistrates; Now, when a complaint is made before the Judge of the Inferior Court of Huntsville is such Judge acting as a Magistrate or Judge of the Inferior Court of Huntsville?

"2. If you hold that he sits as a committing Magistrate is he acting independently of the court and should the committing Magistrate keep separate books for these proceedings and not enter them in the Dockets of the Inferior Court of Huntsville?

"3. If you hold that the committing Magistrate is sitting independently of the Inferior Court of Huntsville and must keep separate dockets for the peace proceedings, would the fees or costs collected for this type of proceedings be payable to Madison County or to the Committing Magistrate, individually and what are the legal costs collectible?

"4. Upon complaint or affidavit being made before the Judge of Inferior Court of Huntsville and a preliminary examination is held is the Judge of the Inferior Court sitting as such Judge or as a committing magistrate?

"5. If you hold that he sits as a Committing Magistrate is he acting independently of the Court and should the Committing Magistrate keep separate dockets for these proceedings and not enter them in the Dockets of the Inferior Court of Huntsville?

"6. If you hold that the Committing Magistrate is sitting independently of the Inferior Court of Huntsville and must keep separate dockets for such preliminary proceedings would the fees or costs collected for preliminary hearings be payable to the Committing Magistrate individually or to Madison County?

"7. If you hold that the fees or costs in peace proceedings and or preliminary hearings are payable to the Committing Magistrate and not to Madison County, Alabama, would there be a statute of limitations which would prevent a prior judge of the inferior court, acting as a committing magistrate from collecting fees or costs due him?"

I shall answer your questions in the following order: 1 and 4, 3 and 6, 2 and 5. It will be unnecessary to answer your question number 7, in view of the answers to the foregoing.

Act No. 213, Local Acts 1911, page 215, approved April 4, 1911, establishes an inferior court to be known as the Inferior Court of Huntsville. This Act has been amended several times but in no respect that influences the questions asked in your inquiry. Amendments are as follows: Act No. 77, Local Acts 1931, page 19, approved March 2, 1931; Act No. 7, Local Acts 1936-37, page 9, approved January 8, 1937; Act No. 91, Local Acts 1943, page 57, approved June 2, 1943.

Your questions numbered 1 and 4 ask whether or not the judge of the Inferior Court of Huntsville sits as a judge of the said court or as a magistrate in two instances. One instance is when he is conducting peace proceedings under the provisions of Title 15, Section 399, Code of Alabama 1940, and the other instance is when said judge is holding a preliminary hearing under the provisions of Title 15, Section 128, et seq., Code of Alabama 1940. This office has heretofore held that in both instances the judge conducting such proceedings, peace proceedings, and acting as a committing magistrate is not acting as a court, but is acting as a magistrate. See Quarterly Report of Attorney General, Vol. 23, page 169; Vol. 35, page 33; Vol. 49, page 97. The fact, however, that the judge of the Inferior Court of Huntsville is sitting as a magistrate in peace proceedings and as a committing magistrate in preliminary examinations does not mean that the fees charged at such hearings should not be paid into the county treasury.

This brings me to your questions numbered 3 and 6. In effect, these questions ask whether or not the fees collected in peace proceedings and as a result of preliminary examinations inure to the benefit of the judge of the Inferior Court of Huntsville, or whether such fees must be paid into the county treasury; and also what are the legal costs collectible in peace proceedings. In both instances, it is my opinion that the fees must be paid into the county treasury.

Section 12 of the Local Act, supra, provides as follows:

> "Sec. 12. The fees and costs of said court shall be the same as are now allowed by law to justices court of this state and shall be collected by the clerk of said court. All of the costs and fees so collected by him shall be paid into the treasury of Madison County once in every month."

When the judge of the Inferior Court of Huntsville holds peace proceedings, he does so by virtue of the fact that he is the judge of an inferior court. Title 15, Section 399, Code of Alabama 1940. Peace proceedings are conducted according to Title 15, Section 401, et seq., Code of Alabama 1940. There is no special schedule of costs and fees which should be taxed in peace proceedings. Therefore, the general schedule of fees for justices of the peace would apply. Section 12 of the Local Act, supra.

Peace proceedings are said to be more in the nature of criminal proceedings than civil proceedings. **Howard v. State,** 121 Ala. 21, 25 So. 1000; **Tomlin v. State,** 19 Ala. 9; 9 C. J. 393; 11 C. J. S. 826. It is my opinion, therefore, that in peace proceedings conducted by the judge of the Inferior Court of Huntsville, the schedule of fees appearing in Title 11, Section 96, Code of Alabama 1940, should be used. This, of course, is the schedule of fees for justices of the peace in criminal cases. Of course, the legal fees chargeable in peace proceedings would be different, depending upon the service rendered by the judge in each proceeding. A fee for the complaint made, the warrant of arrest, or taking a bond and for issuing subpoenas would be chargeable in such cases, depending on the services performed.

When the fees and costs in peace proceedings and as a result of preliminary examinations are collected, Section 12, supra, would, in my opinion, require the payment of these fees into the county treasury. A distinction has been made between an individual acting in the capacity of a court and acting in the capacity of a magistrate. See **Craddock v. Oliver,** 23 Ala. App. 183, 123 So. 87, cert. den. 219 Ala. 607, 123 So. 88. It is my opinion, however, that the distinction should not operate to prevent the county from receiving the fees to which the judge of the Inferior Court of Huntsville would otherwise be entitled. Plainly, the local law establishing the Inferior Court of Huntsville created an inferior court, established the office of judge of that court, and provided for the payment of a salary to the judge. The legal fees to which that judge was

entitled by virtue of his office and by virtue of his right to receive fees equivalent to those of justices of the peace were required by the legislature to be paid into the county treasury. Although Section 12 of the Local Act, supra, requires that fees and costs of the court be paid into the county treasury, it is my opinion that the legislature intended that all fees received by the judge of the court which were received by virtue of the fact that he held that office should be paid to the county.

It is the intention of the law maker which constitutes the law, and a literal interpretation of a statute is not always required. **Abramson v. Hard**, 229 Ala. 2, 155 So. 590. All fees received by the judge of the Inferior Court of Huntsville, therefore, must be paid into the county treasury.

Your questions numbered 2 and 5 ask whether or not a separate docket should be kept for peace proceedings and preliminary examinations. In my opinion, it is not necessary to keep separate dockets for such proceedings. Such proceedings should be entered in the regular criminal docket of the Inferior Court of Huntsville. The Local Act, supra, provides:

> "Section 10. Said clerk must keep civil and criminal dockets of all cases in said court as now provided by law for justices of the peace, provided said dockets shall also show an intemized statement of all costs, fees and fines due and collected, and said clerk shall make a complete statement of all costs, fees, fines and forfeitures due and collected and quarterly report the same to the probate judge of Madison County. . . ."

Since the proceedings referred to in your inquiry are of a criminal nature, it is my opinion that Section 10 of the local act above quoted requires the clerk of the Inferior Court of Huntsville to keep a docket as prescribed by Title 13, Section 418, Code of Alabama 1940. This section makes it the duty of every justice of the peace, "To keep a docket of all criminal cases tried, which docket shall set forth the nature of each case, the judgment rendered therein, an itemized copy of the bill of costs, by whom and of whom the fine and costs were collected, and the disposition made thereof; and such justice of the peace and notary public must attend in person, or make a report in writing of his docket to the grand jury of his county, for their inspection during each session of the grand jury. . . ." In my opinion, both peace proceedings under the provisions of Title 15, Section 399, et seq., and preliminary examinations under Title 15, Section 128, et seq., Code of Alabama 1940, are "criminal cases tried' within the meaning of Title 13, Section 418, Code of Alabama 1940, supra.

It may be added that Title 15, Section 151, Code of Alabama 1940, requires the justices of the peace or magistrates to present a transcript of the docket in the preliminary examination to the solicitor or to the

foreman of the grand jury. In my opinion, the transcript referred to is the transcript of the regular criminal docket.

In view of the foregoing answers to your inquiry, it is unnecessary to answer your question numbered 7.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

June 1, 1949.

Hon. Henry W. Smith, President,
Board of Revenue,
Etowah County,
Gadsden, Alabama.

Counties—Municipalities—Streets.

1. A county governing body, with the consent or permission of the governing body of a municipal corporation, may establish, construct, and maintain, roads, streets, or bridges within the corporate limits of such municipality, when the roads, streets, or bridges are not under the jurisdiction of the State Highway Department.

2. Quarterly Report of Attorney General, Vol. 22, page 193, overruled.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of May 5, 1949, is as follows:

"As President of the Etowah County Board of Revenue, and under authority of Title 55, Section 240 of the 1940 Code of Alabama and amendments thereto, I respectfully request an opinion of you on the questions arising from the following statement of facts:

"Residents and citizens of the City of Glencoe, Alabama, a municipal corporation, located in Etowah County, have requested the Etowah County Board of Revenue to participate in the paving of an existing road which begins at a point on the Anniston-Gadsden Highway within the corporate limits of the City of Glencoe and runs in a northerly direction, to the intersection of same with the Gadsden-Piedmont Highway, a distance of some 3.1 miles. The first

.06 mile of said road from the Anniston-Gadsden Highway is wholly within the corporate limits of the City of Glencoe; the next one mile of said road is bounded on one side by property within the corporate limits of Glencoe and on the other side by property owned by the City of Gadsden, a municipal corporation and within the corporate limits of said city; the balance of 1½ miles of said road lies wholly within the county and outside any corporate limits of any municipality.

"The road in question is not a State Highway controlled road.

"The questions which we are interested in having your opinion on are as follows:

"1. Is a county governing body authorized to contribute to the cost of municipal street improvements in the absence of any showing that said improvements will be of value or benefit, or serve to beautify, any county property?

"2. Can the Etowah County Board of Revenue legally expend funds of Etowah County in participating in the construction of said road within the corporate limits of a municipality under the facts contained in the foregoing statement?

"I refer you to the Attorney General's opinion contained in Volume 22, page 193, dated March 8, 1941."

You are advised that this office on two recent occasions has considered the questions presented in your request, in opinions addressed to Hon. J. M. McLeod, Judge of Probate, Wilcox County, under date of February 21, 1949, and to Hon. Frank O. Deese, Judge of Probate, Dale County, under date of January 17, 1949. Both of these opinions hold that, under the authority of Title 23, Section 49, Code of Alabama 1940, a county governing body, with the consent or permission of the governing body of a municipal corporation, may establish, construct, and maintain roads, streets, or bridges within the corporate limits of such municipality, except in cases where the State Highway Department has jurisdiction over such roads, streets, or bridges. Copies of the two opinions referred to above are enclosed herewith for your information and convenient reference.

You state in your request that the Highway Department does not have jurisdiction over the road here considered. You are, therefore, advised that, under the provisions of Section 49, supra, and the opinions heretofore rendered by this office, your county governing body may expend its funds for the improvement of this road, with the consent or permission of the governing bodies of the municipalities through whose corporate limits the same runs.

The opinion referred to by you, appearing in Quarterly Report of Attorney General, Vol. 22, page 193, in which a difficult conclusion was

reached, did not take into consideration the provisions of Title 23, Section 49, Code of Alabama 1940, and the same is hereby expressly overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 2, 1949.

Hon. A. W. McAllister,
Mayor and Chief Executive Officer,
City of Huntsville,
Huntsville, Alabama.

Municipalities—Property—City of Huntsville, Alabama.

The authority of the City of Huntsville, Alabama to acquire certain properties and facilities from the Federal Government located on the Huntsville Arsenal Reservation, which reservation is located without the corporate limits and a very small portion of which is located within the police jurisdiction of said city, discussed generally.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 20, 1949, encloses copy of a resolution passed by the City Council of the City of Huntsville, Alabama, requesting certain information from this office. Said resolution is as follows:

"RESOLUTION NO. 51-J.

"A RESOLUTION REQUESTING THE ATTORNEY GENERAL OF THE STATE OF ALABAMA TO RENDER AN OPINION TO THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, ALABAMA, AS TO WHETHER OR NOT THE CITY OF HUNTSVILLE, ALABAMA, HAS THE LEGAL AUTHORITY TO ACQUIRE, OPERATE AND MAINTAIN CERTAIN UTILITIES LOCATED IN THE AREA KNOWN AS THE HUNTSVILLE ARSENAL, WHICH AREA IS LOCATED IN MADISON COUNTY, ALABAMA, OUTSIDE THE CORPORATE LIMITS OF THE CITY OF HUNTSVILLE, ALABAMA, AND OUTSIDE THE POLICE JURISDICTION OF THE CITY OF HUNTSVILLE, ALABAMA, WHICH PROPERTIES ARE NOW OWNED BY THE UNITED STATES GOVERNMENT.

"WHEREAS, the United States Government owns a reservation lying in close proximity to the corporate limits of the City of

Huntsville, a very small portion of which lies within the police jurisdiction of the City of Huntsville, the greater portion of which lies outside the police jurisdiction of the City of Huntsville, Alabama, and

"WHEREAS, there is now located within such area certain utilities and properties which are to be offered for sale by the United States of America, which utilities and properties will have great value to the City of Huntsville, Alabama, and the continuous use and operation of such utilities will vitally affect the economic life of the City of Huntsville, some of which utilities are vital to the sanitary condition of the area in which they are located; and

"WHEREAS, the City Council of the City of Huntsville, are of the opinion that it is necessary and essential in order to insure the continuous operation of the utilities, that the City of Huntsville, Alabama make an effort to acquire such properties so that such utilities may be available to Industrial users which are now located, or may hereafter locate within such area; and,

"WHEREAS, the question has arisen whether the City of Huntsville, Alabama, has a legal right and authority to acquire the utilities and certain other properties located on the reservation known as the Huntsville Arsenal, by use of funds from and out of the general funds of the City of Huntsville, Alabama, and whether the City of Huntsville has the power and authority to issue revenue bonds to be paid from and out of the revenue derived from such utilities and properties in order for the City of Huntsville to acquire, operate and maintain such utilities and other properties.

"NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Attorney General of the State of Alabama, be, and he is hereby requested to advise the City Council of the City of Huntsville, Alabama, whether or not the City of Huntsville, Alabama, has the legal authority to do the following:

"(a) To acquire title to the utilities and properties hereinafter described and designated in Paragraphs numbered one through twelve, inclusive, and to maintain and operate them from and out of the general funds of the City of Huntsville, Alabama, and to make such properties and utilities available to Industrial users who are now located, or may hereafter locate within the area known as the Huntsville Arsenal Reservation, all of said utilities and properties are located without the corporate limits of the City of Huntsville, Alabama, a very small portion of which is located within the police jurisdiction of the City of Huntsville, Alabama, but all located in Madison County, Alabama.

"1. Fire fighting equipment.

"2. Street and road construction and maintenance equipment.

"3. Recreational equipment and facilities

"4. Property sites for schools, real estate and buildings.

"5. Hospital buildings and equipment.

"6. Airport including the lands and all equipment constituting the same.

"7. Sanitary sewer lines and mains, together with sewerage disposal systems, all of which are located outside the Police jurisdiction of the City of Huntsville, but in Madison County, Alabama, which are vital to the sanitation of the Huntsville Arsenal area.

"8. Steam plant for the manufacture and sale of steam for heating and other commercial purposes, which steam plant serves an area located wholly outside the police jurisdiction of the City of Huntsville.

"9. Electric distribution system now located in the Huntsville Arsenal area. The City of Huntsville now owns and operates an electric distribution system, serving all of Madison County, Alabama, with the exception of this area.

"10. Railroad tracks located in the Huntsville Arsenal area.

"11. The docks located on the banks of the Tennessee River in Madison County, Alabama, outside the police jurisdiction of the City of Huntsville, Alabama.

"12. Water works system, including water works purification and filtering systems which systems serve the Huntsville Arsenal area, an area located outside the corporate limits of the City of Huntsville, Alabama, which system may in the future be needed to supplement the present water system owned and operated by the City of Huntsville, Alabama.

"(b) To acquire title to the utilities and properties hereinabove described and designated in paragraphs numbered one through twelve, inclusive, from funds to be secured by the City of Huntsville, Alabama, from the issuance and sale of revenue bonds, which bonds are to be paid from and out of the revenue derived from the operation of such utilities and properties, by the City of Huntsville, Alabama.

"BE IT FURTHER RESOLVED that the Clerk-Treasurer of the City of Huntsville, Alabama is hereby directed to submit a certified copy of this resolution to the Attorney General of the State of Alabama.

"ADOPTED this the 12 day of May, 1949."

I am also in receipt of a letter from your City Attorney, stating that the properties referred to in the resolution will be sold by the Federal government at an early date and that the City is desirous of purchasing some of these properties, and, that as time is of the essence an immediate reply is desired.

In view of the ramifications and contingencies involved in your request for an opinion, and the conditional and qualifying answers which will result from definite answers thereto, and further in view of the fact that time is of the essence, this reply will be limited primarily to the authority of the City of Huntsville to acquire the properties and facilities enumerated and described in the resolution.

Your attention is invited to an opinion of this office rendered to the Mayor of the Town of Thorsby, Alabama, on October 10, 1947 (Quarterly Report of Attorney General, Vol. 49, page 41), a copy of which is herewith enclosed, relative to municipalities purchasing properties for the benefits of private enterprise or industry.

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1. The fire fighting equipment may be acquired by the City under the provisions of Title 37, Section 450, Code of Alabama 1940, which authorizes municipalities to maintain and operate fire departments. However, in my opinion, this equipment may be utilized only for the purpose of protecting property within the municipality and property owned by it outside of the municipality, and not for the protection of private property outside of the municipality, except in cases of comity emergencies.

2. The street and road construction maintenance equipment may be acquired by the municipality under the general powers to maintain its streets and roads. However, in my opinion, such equipment may be utilized only for the purpose of maintaining the streets and roads within its municipal territory limits, and for the necessary maintenance of streets and roads which are necessary for proper ingress and egress to its properties located outside of the municipality, and not for the benefit of any private industry or enterprise.

3. The recreation facilities and equipment may be acquired by the municipality under the provisions of Title 37, Section 470, Code of Alabama 1940. I do not think the location of the equipment and facilities should necessarily be within the corporate limits of the City, provided, however, that the inhabitants thereof receive the full benefit of

the same and that they are not primarily for the use and benefit of those inhabitants who live outside the municipality.

4. The property sites for schools, real estate and buildings (which I assume are all for use in connection with school purposes) may not, in my opinion, be acquired by the municipality. Title 37, Section 474, Code of Alabama 1940, authorizing municipalities to purchase school property, purchase lots and erect school buildings thereon, for the use and benefit of the citizens of the respective towns and cities, limits such property to that located within the corporate limits thereof. However, if such a contingency should arise whereby there is no available property for schools located within the municipality, then it is conceivable that property outside of the municipality may be acquired for such a purpose.

5. Relative to the acquiring of the hospital buildings and equipment, reference is made to Title 22, Section 189, Code of Alabama 1940, which authorizes municipalities and counties to establish hospitals. In my judgment, if the hospital is established solely by the municipality, it should be located within the municipality if property is available therefor. If established jointly with the county, it may be outside the corporate limits of the municipality. In any event, it should not be primarily for the benefit of those persons residing outside the municipality.

6. The airport, including lands and all the equipment accompanying the same, may be acquired by the municipality under the provisions of Title 4, Section 25, Code of Alabama 1940, and same need not necessarily be located within the corporate limits thereof.

In this connection, I wish to refer you to General Acts 1945, page 612, relative to the authority of counties and municipalities to issue bonds for the purpose of acquiring airfields and airports.

7. The sanitary sewer lines and mains, together with sewerage disposal systems, all of which are located outside the police jurisdiction of the City, but in Madison County, Alabama, which are vital to the sanitation of the Huntsville Arsenal area, may be acquired by the municipality under the provisions of Title 37, Sections 601 and 608, Code of Alabama 1940.

In regard to the payment for the acquisition of said auxiliary sewerage system, your attention is invited to Title 37, Section 616, Code of Alabama 1940.

8. I find no authority authorizing the municipality to acquire the steam plant for the manufacture and sale of steam for heating and other commercial purposes, which steam plant services an area located wholly outside the City of Huntsville.

9. The electric distribution system now located in the Huntsville Arsenal area may be acquired by the municipality under the provisions

of Title 37, Section 360, Code of Alabama 1940. In this connection, I wish to refer you to an opinion of this office rendered to the Chairman of the Commission Board of Tuscaloosa, Alabama, under date of July 31, 1947 (Quarterly Report of Attorney General, Vol. 48, page 65), a copy of which is herewith enclosed.

10. I find no authority for the acquisition by a municipality of the railroad track located in the Huntsville Arsenal area.

11. The docks located on the banks of the Tennessee River in Madison County, Alabama, outside the jurisdiction of the City of Huntsville, Alabama, may be acquired by the municipality under authority of Title 37, Sections 470 and 475, Code of Alabama 1940.—See **Birmingham v. Brown**, 241 Ala. 203, 2 So. 2d 305.

12. The water works system referred to in the resolution may be acquired by the municipality under the provisions of Title 37, Section 360, Code of Alabama 1940.—See also opinion to Chairman of the Commission Board, Tuscaloosa, Alabama, copy of which is enclosed.

In regard to issuance of bonds for this purpose, see Title 37, Section 365, Code of Alabama 1940.

Generally speaking, the authority of a municipality to acquire property necessarily implies the authority to maintain the same out of its general funds, provided it does not exceed its constitutional debt limit. However, those projects which are revenue producing, and the cost of which is self-liquidating, do not constitute municipal debts, and purchase and maintenance of such projects should be borne out of the revenues derived therefrom or by the proper assessments against the property benefited thereby.

In addition to the Code provisions above cited in regard to the financing of the purchase of the projects under consideration, your attention is invited to Title 37, Chapter 6 (Sections 251-273) of the Code of Alabama 1940, and amendments thereto, in regard to municipal bonds. Your specific attention is called to Section 276 of this Chapter.

Although the above does not answer each of your specific inquiries in detail, it should give you sufficient information to proceed with the prospective negotiations with the Federal government for the purchase of certain of the properties and facilities enumerated in the resolution. The method of the proper financing by the City of Huntsville of authorized purchases may be effectuated by compliance with the pertinent provisions of the law regarding the acquisition of the particular projects involved. In regard to the prospective sale of bonds, an opinion of a recognized bond attorney will probably be required before recognized bond dealer will purchase certain bonds which may hereafter be issued by the City of Huntsville for the purchase of certain of the properties and facilities involved.

As heretofore stated, since time is of the essence in regard to the proposed purchases, and it is a physical impossibility to answer in detail all of your specific inquiries within the time of the proposed sale, my answers are limited to the authority of the City of Huntsville to acquire the properties and facilities as described in the resolution.

If there is any further information you desire, please advise.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 2, 1949.

Hon. Ralph P. Eagerton,
Chief Examiner of Public Accounts,
CAPITOL.

Counties—Banks and Banking—Bonds—Warrants—Gasoline —Roads and Bridges—Attorneys—Contracts.

1. The expenses of the sale of county gasoline anticipation tax warrants are a claim and may be paid out of the regular county gasoline or road fund, or out of the proceeds of the sale of said warrants, or out of surplus general funds transferred to the road fund.

2. A county having issued gasoline anticipation tax warrants, and having designated a national bank as paying agent or trustee depository, and agreement between county and bank provides that revenues received by the bank shall be used solely for payment of principal and interest on said warrants, the bank cannot retain service charges out of funds remitted to it.

3. Fact that bank's charges for acting as paying agent or trustee depository for county in handling gasoline anticipation tax warrants are based on outstanding warrants rather than paid warrants does not conclusively show that such bank charges are unreasonable.

4. Agreement between county and bank not required to be in writing but should be in writing.

5. Fact that bank service charges are based on outstanding warrants rather than paid warrants does not conclusively show that bank has performed no material service.

6. Certain expenses attending sale by county of gasoline anticipation tax warrants and certain expenses of servicing by bank of said warrants are incurred for "construction, improvement, maintenance and supervision of highways, bridges and streets," or for "the working of the public roads . . . or otherwise improving the roads."

Opinion by Assistant Attorney General Sykes.

Dear Sir:

I have two requests for official opinions asking various questions concerning the power and authority of the county governing body to pay various service charges imposed by national banks in handling gasoline anticipation tax warrants of the county. One request is from you, and the other is from Hon. J .C. McGough, Judge of Probate, Fayette County. I here quote these requests which illustrate the nature of the questions asked:

"I am submitting below certain statements of facts upon which your official ruling is requested in order to clarify some phases of the law in respect to the handling of the excise tax on gasoline, etc., distributed to the several counties of the State:

"STATEMENT OF FACTS:

"# 1. The several counties of the State are entitled to their share or portion of the excise tax on gasoline, etc., as levied under Section 647, Title 51, 1940 Code of Alabama, as amended, to be distributed under the provisions of Sections 655 and 657, of said Title 51, as amended, and to be used exclusively for the construction, maintenance, supervision and policing the public roads and bridges in their respective counties, with the provision in Section 655 of said Title, **'the use or expenditure of any of said funds in any other manner or for any other purpose than as provided herein, by the governing body of any county, or by any individual member of said body, shall constitute a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail or hard labor for the county for not less than one or more than twelve months.'**

"# 2. The several counties of the State are compelled, from time to time, to raise funds for construction and maintenance when such roads programs are expensed beyond current available funds to cover, by the issuance and sale of what are commonly called **'State Gasoline Tax Anticipation Warrants,'** which are made payable over a period of years not to exceed the limitations as prescribed by law; that such warrants are creatures of judicial decision and are not expressly provided for by statute; that such warrants create no debt of the county payable from its general fund, but amount

merely to a contract or assignment to pay certain sums of money, in the future, out of the funds the county may receive from the State pursuant to the provisions of Section 655 and 657, Title 51 of the 1940 Code, as amended; that the contract or assignment to pay certain sums of money, in the future, usually provides that the State Comptroller shall remit directly to some designated trustee-depository and/or paying agent, which in most every instance, is some national bank, (due to the provisions of Section 137, Title 5, of the 1940 Code of Alabama, prohibiting State banks from making charges for the handling and collection of all such warrants issued by the State of Alabama, or by any county, or other political sub-division thereof), and, under such contract or assignment, such funds, as and when remitted by the State Comptroller to the designated trustee-depository or paying agent, must be disbursed solely for the payment of and interest on said warrant, and any surplus remaining after the entire issue, and the interest thereon has been paid, reverts back to the county.

"# 3. The compensation due the trustee-depository or paying agent for its services in connection with the handling of the monthly installments remitted by the State Comptroller and/or county for the payment of the principal of and interest on said warrants, in the absence of any provisions in such contract or assignment to include funds for such payment, must be obtained by the designated trustee-depository or paying agent filing a timely claim against the county, and which claim, under the provisions of Section 115, Title 12 of the 1940 Code of Alabama, must be itemized and sworn to by the claimant, and must be based upon services actually and currently performed.

"# 4. For the payment of all bonds, warrants and interest coupons, most New York City banks charge 1/10 of 1% for paying bonds and/or warrants and 1/4 of 1% for paying interest coupons thereon, and the funds for the payment of such obligations, including service charges, are only remitted by the County Treasury so that such funds may be on hand on or before the due date.

"# 5. In the negotiation and sale of such warrants, it is necessary, in most instances, to use the services of interested bond and warrant brokers, to whom a commission must be paid. Sometimes the expenses of such sales, such as printing of the warrants and legal opinions are covered in the commissions paid; and, sometimes a special sum is agreed upon, in writing, for the printing of the warrants and legal opinions, to be paid for by the county.

"# 6. For the payment of all gasoline warrants and the interest coupons attached at the designated trustee-depository or paying agent, the State Comptroller, when duly authorized to do so, transmits certain monthly installments, which are accumulated by the trustee-depository or paying agent for periods of six months at a

time, and then used to pay semi-annual maturing warrants and all accrued interest coupons, and, therefore, the designated trustee-depository or paying agent, unlike the New York City banks, has funds on hand for approximately a period of three months in advance of the due date of warrants and interest coupons. Prior to the agreement by and between several of the national banks in Alabama, having trust departments, the handling charges for services rendered did not exceed the charges as set forth above in #4.

"# 7. Since the agreement between several of the national banks in Alabama, having a trust department, and prior to the convening of the 1947 Legislature, when requested, quoted their charges under identical circumstances, as set out below:

"Acceptance Fee: 1/10 of 1% of amount of issue. Minimum $50.00

"Annual Fee: 1/10 of 1% of warrants outstanding. Minimum $25.00.

"# 8. During the session of the 1947 Legislature, a Bill, sponsored by the Association of County Commissioners of Alabama, was pending before that Body, seeking to relieve the counties from paying the fees or service charges based upon the rates as set forth in #7, but this Bill was withdrawn, leaving the matter of compensation to stand in the same status as heretofore; and, which, obviously, if I understand the law correctly, must be based upon services actually and currently performed.

"# 9. However, at the present date, instead of charging for their services, in connection with the retirement of these gasoline warrants and the interest coupons, on the basis of the charges as are made by the New York City banks (See #4), such banks as have been contacted, quote the following charges for identical services, to-wit:

"Acceptance Fee: 1/10 of 1% of issue if warrants are authenticated.

1/20 of 1% of issue if warrants are not authenticated. Minimum—$50.00.

"Annual Fee: .075 of 1% of warrants outstanding on first $100,000.00.

.050 of 1% of warrants outstanding on balance of issue. Minimum—$25.00 (For the computation of annual fees, the maximum amount of warrants outstanding during fee-period will be used).

"Based upon the foregoing statements of facts, you are requested to render an official opinion on the following questions, to-wit:

"1. Would the expenses of sale of such warrants, including commissions, the printing of the warrants and legal opinions, as mentioned in #5 of Statement of Facts, constitute a legal claim against the regular gasoline fund or against the proceeds of the funds arising in the sale of such gasoline tax anticipation warrants?

"2. If your answer to the above question is in the negative, then advise out of what fund or funds may such expenses be paid?

"3. In the event that the contract or assignment provides that the payments, remitted direct to the designated trustee-depository or paying agent by the State Comptroller or by the county, must be used solely for the payment of and interest on said warrants, and that any surplus remaining, after the entire issue, and the interest thereon, has been paid, reverts back to the county, as referred to in #2 of Statement of Facts, could any portion of said funds while in the hands of the designated trustee-depository or paying agent, be used to pay service charges, if

"(a) Such charges are based upon services actually and currently rendered in the disbursing of funds for the payment of and interest on said warrants, and all other incidental duties and obligations in connection with such services, to be covered by a charge of 1/10 of 1% for paying warrants and 1/4 of 1% for paying interest coupons, which is the same rate now being charged by the New York City banks for a like service?

"If your answer to sub-section (2) of Section 3 above is in the negative, then advise out of what fund or funds can such charges be paid in view of Section 647, Title 51 of the 1940 Code of Alabama, as amended, and quoted in #1 of Statement of Facts?

"(b) Said charges are not based upon actual and current disbursements made as per #4 of Statement of Facts, but an Annual Fee is computed upon the maximum amount of warrants outstanding during the fee-period, with a minimum of $25.00 and rate as set forth in #7 and #9 of Statement of Facts?

"If your answer to sub-section (b) of Section 3 above is in the negative, can such charges constitute a legal claim against the county when not computed upon actual and current disbursements in paying warrants and interest coupons, as per State #4 of Statement of Facts, but an Annual Fee is demanded by the trustee-depository or paying agent to be computed upon the maximum amount of warrants outstanding during the fee-period at the rates as set forth in 7# and #9 of Statement of Facts, with a minimum of $25.00?

"If your answer is to the effect that such charges may constitute a legal claim against the county, then please set out how and under what conditions such claims may constitute a legal claim against the county, and out of what fund or funds may such charges be paid, in view of Section 647, Title 51 of the 1940 Code of Alabama, as amended?

"4. At what time and under what conditions and what kind of service must be performed by any designated trustee-depository or paying agent, in order to earn, and obligate the county to pay, an Acceptance Fee of 1/10 of 1% of total amount of gasoline warrants issued, with a minimum of $50.00, as set out in #7 of Statement of Facts?

"5. At what time and under what conditions and what kind of service must be performed, in order to earn, and obligate the county to pay to any designated trustee-depository or paying agent, an Acceptance Fee of 1/10 of 1% of the total issue, if the warrants are authenticated, and 1/20 of 1% of the total issue, if the warrants are not authenticated, with a minimum of $50.00 as set out in #9 of Statement of Facts?

"6. In the event you rule that an Acceptance Fee can legally be paid by the county, would the county be legally liable for the amount of the Acceptance Fee as per #7 and #9 of Statements of Facts, or would the governing body of the county have the right to deny payment of such Fee in the absence of any written agreement in respect to such fee prior to or at the time the trustee-depository or paying agent was appointed?

"7. In the event that an Acceptance Fee, in any amount can be legally paid, then advise whether or not such a fee will constitute a legal charge against the regular gasoline fund or against the proceeds of the funds arising in the sale of such gasoline tax anticipation warrants.

"8. May the governing body of a county enter into an agreement to pay an Acceptance Fee at the rates as set forth in #7 and #9 of Statements of Facts, or for a greater or less amount?

"9. May the county governing body refuse the payment of any such Acceptance Fee, if in its judgment, no material service has been performed or rendered over and above the services heretofore rendered by banks acting as trustee-depository or paying agent?

"Your ruling, in detail, upon the questions herein submitted, is urgently requested at the earliest date possible, and will be welcomed by every county in the State of Alabama at the present time."

"Washington County, Alabama, has recently issued some $300,000.00 State Gasoline Tax Anticipation Warrants, and has paid to a certain Investment and Security Dealer a commission equaling to 2½% of the principal sum of said warrants to cover all expenses and fees in connection of said issue.

"Washington County is now paying to a certain bank in Montgomery, Alabama as Trustee-Depository for its County Gasoline Tax Anticipation warrants recently issued, an acceptance fee based on 1/10 of 1% of the amount of issue, and, in addition thereto, an annual fee of 1/10 of 1% on warrants outstanding. Heretofore such services have been based upon disbursements and the usual rates charged have been 1/10 of 1% for paying warrants on bonds and 1/4 of 1% for paying interest coupons, and the charges being so reasonable, such services have been paid out of the sinking funds created for the purpose of retiring said principal sums of said warrants and the interest thereon. However, the charges have been increased nearly 500%, and the sinking funds heretofore created for the retirement of the principal and interest will not be sufficient to pay all of these increased service charges, and, will therefore, if not reduced, have to be paid out of the other funds.

"Therefore, please advise out of what fund or funds may the 2½% commissions, mentioned in paragraph (1), and the service charges mentioned in paragraph (2) be legally paid, since Section 647, Title 51 of the 1940 Code of Alabama, as amended by the 1945 Legislature (General Acts, 1945, page 590) approved July 6, 1945, prohibits the use of any gasoline funds by the County except for the purpose of constructing, improving, maintaining and supervising the county highways and bridges."

Your inquiry involves the validity of certain charges made by national banks when such banks are acting as trustee depository in the handling of county gasoline anticipation tax warrants. I shall answer those questions which I am able to answer with the information which you have given me. I cannot answer some of your questions which concern the reasonableness of bank charges because I have no evidence as to what is and what is not a reasonable charge. Such a decision would require the taking of testimony which I am not equipped to do.

1. In my opinion, the expenses of the sale of county gasoline anticipation tax warrants, including broker's commissions, printing the warrants, and legal opinions, constitute a legal claim either against the regular gasoline fund, or against the proceeds of the funds arising from the sale of gasoline anticipation tax warrants. In my opinion, the county governing body may choose the fund, either the regular gasoline fund (road fund), or the funds derived from the sale of the warrants, in paying the enumerated expenses of sale.

The court of county commissioners has full authority in the expenditure of funds for the construction of roads and bridges in the county. Title 23, Section 43, Code of Alabama 1940; **Ensley Motor Car Co. v. O'Rear,** 196 Ala. 481, 71 So. 704. It is my opinion that the broker's commission for selling county gasoline anticipation tax warrants, expenses of printing, and legal expenses may be considered by the county as reasonable and necessary items of expense, and further that said items of expense are incurred "for the construction, improvement, maintenance and supervision of highways, bridges and streets," within the meaning of Title 51, Section 647, Code of Alabama 1940, and Title 51, Sections 655-657, Code of Alabama 1940, as amended by Act No. 367, General Acts 1945, page 590, and Act No. 20, General Acts 1943, page 20.

You are further advised that such expenses may be paid out of the road fund under the provisions of Title 23, Section 47, Code of Alabama 1940, when that fund has been supplemented by surplus general funds of the county under the provisions of that section. In my opinion, the items of expense enumerated, consisting of broker's commissions, printing, and legal expenses, when such expenses are incurred in connection with the issuance of gasoline anticipation tax warrants, are expenses incidental to constructing, maintaining, or building public roads.

In the case of **Ensley Motor Car Co. v. O'Rear,** supra, it was held that the county could properly purchase an automobile, because such property was reasonably necessary for the construction and maintenance of the public roads. In my opinion, the items of expense above enumerated are likewise reasonably necessary when the county issues gasoline anticipation tax warrants.

In the case of **Weakley v. Henry,** 204 Ala. 463, 86 So. 46, it was held that the board of revenue may pay from the proceeds of a bond issue (issued for the purpose of building public roads) "only the reasonable and actual expenses of the same—printing or lithographing, postage, and a reasonable attorney's fee." In the course of the opinion the Supreme Court said:

> "Such reasonable expense may be said to be that of construction and maintenance of the public improvements in question, and is within the purview of Board of Revenue v. Merrill, supra, Ensley Motor Car Co. v. O'Rear, supra, and Smith v. McCutchen, Judge, 146 Ala. 455, 41 South. 619. For the law did not presuppose that all or any members of the board of revenue were attorneys, constructing engineers, or architects; that is to say, the legitimate expenses of administering the government in the matter of the issue of bonds for the purpose indicated by law may be paid from such proceeds, and no other sum."

It is true that the case of **Weakley v. Henry,** supra, held that the payment of a commission to a bond broker was illegal, but in that case the amount of the fee was ten per cent of the amount of the issue, and

further the statute authorizing the issue provided that the bonds should not be sold for less than face value, and should not bear interest greater than five per cent. The payment of such commission would have violated this term of the statute. These limitations are not imposed upon a county issuing gasoline anticipation tax warrants for such warrants are issued under the general authority of the court of county commissioners contained in Title 23, Section 43, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 40, page 29. **Cochran v. Madison County**, 242 Ala. 314, 6 So. 2d 489; **Lyon v. Shelby County**, 235 Ala. 69, 177 So. 306; **Herbert v. Perry, et al**, 235 Ala. 71, 177 So. 561; **Isbell v. Shelby County**, 235 Ala. 571, 180 So. 567; **Burleson v. Court of County Commissioners**, 235 Ala. 576, 180 So. 572.

In summary, therefore, the county may pay the expenses of sale of such warrants (1) out of the regular gasoline or road fund, (2) out of the proceeds of the sale of the warrants, or (3) out of the surplus general funds of the county transferred to the road fund under Title 23, Section 47, Code of Alabama 1940. The court of county commissioners may exercise its discretion in choosing the funds from which said expenses may be paid.

2. In view of my answer to question number one, it is unnecessary to answer your question number two.

3. (a) (b) As I stated at the outset of this opinion, I cannot determine whether the rate the bank charges to perform its services and the fees charged by the bank are reasonable or unreasonable. I will advise, however, that if the contract or assignment between the county and the bank provides that the payments remitted direct to the bank by the State Comptroller must be used solely for the payment of and interest on said warrants, and further provides that any surplus remaining after the entire issue and the interest thereon has been paid shall revert to the county, then it is my opinion that the bank is not authorized to retain its service charges out of the funds remitted by the State comptroller. Obviously, if the contract or assignment between the bank and the county provides that such funds shall be used only for the payment of principal and interest, then one party to the contract, the bank, would not be authorized to use the funds for any other purpose. When the contract contains such provision, the bank must look to the county for the payment of its service charges, and not retain its fees out of funds remitted solely for payment of principal and interest. Otherwise, the contract would be breached. I have already indicated out of which funds said service charges may be paid. Reasonable service charges may be paid by the county out of the same funds that expenses of the sale of such warrants may be made. That is to say, out of any of the three funds discussed in part one of this opinion. Such service charges are, in my opinion, expenses for construction, improvement, maintenance, and supervision of highways, bridges, and streets.

It should here be stated that the fact that the bank calculates its fees or compensation upon the basis of outstanding warrants rather than

warrants paid, would not in and of itself cause the bank charges to be unreasonable. Simply because the bank formerly based its fees or compensation upon actual payments of principal and interest and now bases its charge upon the amount of warrants outstanding and unpaid would not indicate that the latter method results in an unreasonable charge. This is merely a fact to be taken into consideration by the court of county commissioners in determining whether or not the charge was reasonable or unreasonable.

4. I am unable to answer this question, for the reason that I have no facts before me to show whether the charge is reasonable or unreasonable.

5. I am unable to answer this question, for the reason that I have no facts before me to show whether the charge is reasonable or unreasonable.

6. I have stated in effect that a reasonable acceptance fee could be paid by the county. As to the amount of the acceptance fee, the county may pay any reasonable amount from the funds as indicated in part one of this opinion. It is further my opinion that the county could not deny the payment of such fees claimed by the bank merely because there was no written agreement between the county and the bank to pay an acceptance fee at the time that the trustee depository was appointed. If the county governing body had knowledge at the time that the trusee depository or paying agent was so designated that certain fees were to be charged, or if such knowledge could be imputed to the county governing body that certain fees were to be charged by the bank, and the county with such knowledge designated the bank as paying agent, then there would be an implied contract to pay the bank acceptance fees and other fees. Such a contract need not necessarily be in writing, but I strongly advise that such contract should be in writing.

7. I have already stated in part one of this opinion that a reasonable acceptance fee may be paid out of any one of the funds designated in part one of this opinion, and that the county governing body has the discretion to designate the fund.

8. In my opinion, the governing body of the county may enter into an agreement to pay an acceptance fee at the rate set forth in number seven and number nine of the statement of facts. It is further my opinion that the county governing body may enter into an agreement to pay a greater or lesser amount. It should be added that the payment of such charges are wholly within the discretion of the county governing body.

9. In answer to your question nine, you are advised that the county, of course, could refuse payment of the acceptance fee if, in its judg-

ment, no material service has been performed by the bank. I have already stated, however, that the mere fact that the acceptance fee is based upon the amount of warrants outstanding does not necessarily indicate that the bank has performed no material service or that the charge is unreasonable. A county which has entered into a contract, express or implied, to pay an acceptance fee in a certain amount or at a certain rate would be in no position to refuse payment.

I have already indicated the funds out of which said service charges should be paid, and a detailed answer to the second inquiry, supra, is unnecessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 8, 1949.

Hon. Marvin Copeland, Member,
Tax Equalization Board,
Tuscaloosa County,
Tuscaloosa, Alabama.

Boards of Equalization.

Failure to serve notice of increased assessed valuation in accordance with Title 51, Section 55, Code of Alabama 1940, shall not invalidate such assessment by a county board of equalization.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of April 15, 1949, is as follows:

"Where a County Board of Equalization raises a tax payer's tax value, we will say, from $500.00 to $1,000.00, or any amount of raise, and a registered notice is sent to the tax payer and for some reason the tax payer fails to get the notice, and the notice is returned undelivered to the office of the Tax Equalization Board; now the question is: has the Tax Board the authority, or is it legal, for them to enter the raise up against the property owner?

"The writer is of the opinion that we have no legal right to do this and we must get the tax payer a notice."

I am of the opinion that your request must be answered in the affirmative.

Your attention is invited to the express provisions of Title 51, Section 55, Code of Alabama 1940, which read in part as follows:

> "In the event the value of real or personal property of any taxpayer is increased by the county board of equalization, herein created, over the assessed value thereof, for the next preceding year, the taxpayer shall be furnished by registered mail, return receipt demanded, or in person, by the secretary of the county board of equalization, with a statement showing separately the value of his personal property, and his real property, and improvements thereon, * * * * * *. **But failure to give or receive the notices required in this section shall not invalidate such assessment.** Provided, however, that the taxpayer shall have the right any time before the taxes become delinquent to appear before the county board of equalization and have the assessment of his property reopened, if satisfactory proof is made that the taxpayer or his agent did not receive notice of such increase." (Emphasis supplied.)

In view of the express language of the above quoted statutory provision, I am of the opinion that your board of equalization has the authority to increase the valuation of said taxpayer's property even though the registered notice of such increased valuation was returned undelivered.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 9, 1949.

Hon. Lucy P. Tucker,
Tax Assessor,
Bullock County,
Union Springs, Alabama.

Motor Vehicles—Ad Valorem Tax—Exemptions.

Ad valorem taxes assessed against a motor vehicle as a part of a dealer's stock of merchandise for the tax year commencing October 1, 1948, are payable by such dealer and not by a purchaser of the motor vehicle.

The owner of a motor vehicle must pay the ad valorem taxes for the preceding tax year as a condition precedent to his receiving a tag for the vehicle, unless the vehicle was assessed for the prior tax year as part of a dealer's stock of merchandise.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of April 21, 1949, is as follows:

"Please furnish my office with your official opinion in the following matter:

"In the assessment of stock, merchandise and wares of an automobile agency as of October 1, 1948, there was included in this assessment a demonstrator (car).

"Recently this demonstrator (car) was sold, by the Automobile Agency, to an individual owner.

"My office desires a ruling on whether or not there is due ad valorem tax on the car in question. If so, by whom is the tax due? The automobile agency or the individual owner?"

The answer to your questions are as follows:

1. For the tax year commencing October 1, 1948, the ad valorem tax on the car is due by the agency which included the car in the assessment of its stock of goods for said tax year. The purchaser of the car from the agency is not required to discharge the tax lien which arose by reason of the assessment by the agency for said year. Title 51, Section 704(d), Code of Alabama 1940, as amended; Quarterly Report of Attorney General, Vol. 31, page 40.

2. The liability of the individual purchaser of the car for ad valorem taxes when he applies for his motor vehicle tag for the car is dependent upon whether there is a tax due for **the preceding tax year.** If there is a tax due on the car for the tax year October 1, 1947 - September 30, 1948, the purchaser must pay this tax before he can receive a tag for the tax year October 1, 1948 - September 30, 1949. Note, however, that Section 704(d), **supra,** provides that the purchaser is not required to discharge a tax lien for the preceding tax year (October 1, 1947 - September 30, 1948) that arises because of an assessment as a part of the stock of goods of a dealer. It does not appear from your request whether there is any tax due for the tax year October 1, 1947 - September 30, 1948; but if there is a tax for such year because of an assessment as a part of the stock of goods of a dealer, the purchaser is entitled to his tag for the current tax year without paying such ad valorem tax assessment. If, however, there is a tax due for the year October 1, 1947 - September 30, 1948, otherwise than as an assessment as a part of the stock of goods

of a dealer, the purchaser is required to discharge such lien before receiving his tag for the current tax year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 9, 1949.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Taxation—Filing Tax.

Filing tax on deeds offered for recordation under the provisions of Title 51, Section 618, Code of Alabama 1940, is based upon the value of the property in excess of any mortgages or vendors lien upon said property on which the mortgage tax has been paid.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 4, 1948, is as follows:

"A deed was filed for record in my office this morning on which I would like to have you give an opinion as to the charges to be made on filing it for record. What is the correct filing fee?

"The deed recites as follows:—'The above described property is conveyed subject to the following:

" '1. Ad valorem taxes accruing on or after the first day of October, 1947.

" '2. The lien of the mortgage given by the parties of the first part to the First National Bank of Attalla on the 27th day of December, 1946, as shown by mortgage recorded in Mortgage Book "321," page 80, in the office of the Judge of Probate of said County.'

"What I would like to know is whether to charge deed tax on the consideration of $350.00 or should I charge also on the amount of the mortgage to the First National Bank of Attalla in as much as the party did not assume it but is just conveyed subject to it.

"If the mortgage was foreclosed, it would be done in the name of Alfred Earl Watts and wife and not in the name of the present owners.

"I will appreciate an early consideration of this. I am enclosing a copy of the deed for your convenience."

I am of the opinion that under the express provisions of Title 51, Section 618, Code of Alabama 1940, you should charge a deed tax on the value of the property or interest so transferred by the attached deed which is in excess of any mortgages or vendors lien on said property and on which the mortgage tax has been paid.

Your attention is invited to the following pertinent portions of Title 51, Section 618, supra:

"No deed, bill of sale, or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, * * * shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: Upon all such instruments which are executed to convey real or personal property situated in this state of the value of five hundred dollars or less there shall be paid the sum of fifty cents, * * *. Provided that only the value in excess of any mortgages or vendors lien upon any property within this state on which the mortgage tax has been paid shall be taxable under this section."

It is to be noted that the deed tax is computed, not upon the mere consideration as cited in the deed, but is based upon the value of such property as transferred by said instrument. Further, it is to be noted that the tax as based upon the value of said property shall be only upon the value which is in excess of any mortgages or vendors lien upon said property and on which the mortgage tax has been paid, for the recordation of said mortgage.

Therefore, I am of the conclusion that you should charge a deed tax upon the value of the property as transferred by the attached deed which is in excess of the mortgage as so recorded, if the tax was paid upon same. See Quarterly Report of Attorney General, Vol. 19, page 181. Your attention is also invited to a recent opinion of this office dated May 2, 1949 to the Honorable T. R. Ward, Judge of Probate, Henry County, Alabama, a copy of which is enclosed for your information.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 9, 1949.

Hon. C. S. Jones,
Tax Assessor,
Escambia County,
Brewton, Alabama.

Taxation—Exemption—Factories.

1. Only those plants and factories expressly enumerated are qualified for the tax exemption provided for by Title 51, Section 3, Code of Alabama 1940.

2. The exemption granted by Title 51, Section 3, Code of Alabama 1940, to factories and plants shall cease whenever the operation of such factory or plant for the purpose of its construction shall be abandoned.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of April 12, 1949, is as follows:

"Please advise me if Sec. 3, page 12, Revenue Laws of Alabama, 'Exemption of certain factories, industries and plants,' or any other Statute, authorize the Board of Revenue to exempt or remit the taxes of the following industries or plants:

"Soft Drink Bottlers,

Concrete Brick Manufacturers,

Lumber and Veneer Mills,

Concrete Pipe Manufacturers,

Meat Packing or Slaughtering Businesses.

"Also advise me in case where building was erected and exemption granted and business closed down after one years operation. Can this building be sold to another person organizing different business and be granted new exemption on same building.

"Thanking you to give me ruling on above or direct me to proper ruling covering such cases."

In answer to your first inquiry, I am of the opinion that "soft drink bottlers," "concrete brick manufacturers," "lumber and veneer mills," "concrete pipe manufacturers," and "meat packing or slaughtering busi-

nesses" are not qualified for the tax exemption as provided for by Title 51, Section 3, Code of Alabama 1940.

Title 51, Section 3, supra, lists specific classes of factories and plants which are qualified for certain exemptions from the payment of ad valorem taxes. The above enumerated plants as described in your request are not listed within in any of the enumerated classes of exempted factories or plants. As the courts have many times held that exemptions are strictly construed against the person claiming such exemptions, it is my considered opinion that the plants or factories as described in your request are not subject to the exemption, as there is no specific provision expressly granting an exemption to these type plants or factories.

In deciding this question, I am not unmindful of the contention that is often made that the expression "or any other manufactured products" as used in Section 3 extends the exemption to classes of factories other than those specifically designated.

Quoted for your information is the following excerpt from Title 51, Section 3, supra:

> "§3. Exemption of certain factories, industries and plants.—For the purpose of encouraging the building, extending, and operation of factories for the spinning of thread and yarns, * * * and factories for the manufacture of bags, wood pulp products, glass factories, ceramic factories, enameling factories and silica processing industries, paper, paper bags and other pulp products, wooden cabinets, and farm implements or mining of gold and graphite, **or any other manufactured products,** * * * * the court of county commissioners, or other court or board having like jurisdiction of any county, * * are authorized and empowered to remit the taxes assessed for all county and municipal purposes, * *." (Emphasis supplied.)

The doctrine of "ejusdem generis" requires that where particular classes of things are followed by general words, the general words are presumed to describe the particular classes previously enumerated. If the legislature had intended the general expression "or any other manufactured products" to include products of the classes not enumerated previously, it would have been unnecessary and uncalled for to have enumerated the various particular types of factories that are set forth. **Central of Georgia v. State,** 40 So. 991, 145 Ala. 99; **Johnson v. State,** 32 Ala. 583; **Prim v. State,** 36 Ala. 244. Therefore, the expression "or any other manufactured products" means any other manufactured products of the kinds and nature previously enumerated in Section 3.

In answer to your second inquiry, your attention is directed to the specific provisions of Title 51, Section 5, Code of Alabama 1940, which reads as follows:

"§5. When such exemption ceases.—The exemption granted to any factory or plant becoming entitled to its enjoyment, and as to the capital stock thereof, **shall cease whenever the operation of such factory or plant for the purpose of its construction shall be abandoned.** Provided that where such plant is not operated for a consecutive period of twelve months, such fact shall be prima facie evidence of such abandonment." (Emphasis supplied.)

It is to be noted that the exemption granted by Section 3 of said Title shall cease whenever the operation of such factory for the purpose of its construction shall be abandoned or changed. Therefore, I am of the opinion that your second inquiry must be answered in the negative, for the reason that when a plant or factory is sold to another person for a different type of business than that for which the exemption was originally granted, then such exemption ceases. However, I would like to add this caveat, and that is that the mere reorganization of the original corporation or the sale of the assets to a different person, firm or corporation, does not nullify the exemption if the operations of said plant or factory are continued for its original purposes. In this respect, I invite your attention to the specific proviso as contained in Title 51, Section 3, supra, which reads as follows:

"* * * Provided that the period of the foregoing exemption shall not be extended, renewed or in any way added thereto, because of any reincorporation, or reorganization of the original corporation, or the sale of the assets to a different person, firm or corporation. * *."

In conclusion, you are advised that it is my opinion that your first inquiry must be answered in the negative and that your second inquiry must also be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 9, 1949.

Hon. Chester C. Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—Filing Tax—Exemption.

A savings and loan association is not a bank within the purview of Title 51, Section 619, Code of Alabama 1940, as amended.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of February 26, 1949, is as follows:

> "We have a question relative to collection of state tax on mortgages under Title 51, Paragraph 619, 1940 Code of Alabama, and Paragraph 619 (1) in 1947 Cum. Supplement.
>
> "Is a Savings and Loan Association, as organized under Title 5, Paragraph 211, etc. of 1940 Code, a **bank** within the meaning of the word **bank** as used in Title 51, Paragraph 619(1) in 1947 Supplement of the 1940 Code of Alabama?
>
> "Thus, is a State Savings and Loan Association subject to state mortgage tax, in the light of Title 51, Paragraph 619(1)? The question is raised, of course, because Title 51, Paragraph 619(1) is a new statute."

I am of the opinion that your inquiry must be answered in the negative.

It has long been the established rule of law that exemptions are construed most strictly against those seeking such exemptions.

Act No. 181, General Acts 1947, page 66, amended Title 51, Section 619, Code of Alabama 1940. That act exempted banks and banking institutions doing business in the State of Alabama from the tax as levied by Section 619. Section 1 of that act reads as follows:

> "That the term bank as used in this act shall be held to mean a Corporation holding a charter issued by the Comptroller of the United States or the banking authorities of the State of Alabama and duly authorized to receive funds or deposit, to be repaid on demand, and to carry on the general business of banking, and **subject to all the laws of the State applicable to corporations carrying on the business of banking.**" (Emphasis supplied.)

It is to be noted that only those banks or banking institutions which are subject to **all** the laws of the State applicable to such corporations carrying on the business of banking are included within the express definition of the term "bank." Savings and loan associations operate under a separate and distinct chapter of Title 5, Code of Alabama 1940, which chapter provides, in Section 244 thereof, a separate savings and loan board which is distinct from the banking board as provided for by Title 5, Section 6, Code of Alabama 1940. It is to be further noted that savings and loan associations are not regulated or governed in any way

by the statutory provisions which pertain to the Bureau of Banking and Banking Board. (Title 5, Sections 1 through 98, Code of Alabama 1940.)

Therefore, I am of the opinion that a State savings and loan association is not a bank within the meaning of the word "bank" as used in Title 51, Section 619(1), Code of Alabama 1940, as amended, as such organizations are not subject to all the laws of the State applicable to corporations carrying on the business of banking.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 9, 1949.

Hon. C. C. Fountain,
Mayor, City of Brewton,
Escambia County,
Brewton, Alabama.

Taxation—Exemption—Factories.

1. Creameries are qualified for the tax exemption provided for by Title 51, Section 3, Code of Alabama 1940.

2. Plants for the bottling of soft carbonated drinks are not qualified for the tax exemption provided for by Title 51, Section 3, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion is as follows:

"By direction of the City Council of the City of Brewton, Alabama, as shown by a certified copy of a resolution adopted by it on September 9, 1947, hereto attached, I request on behalf of the City Council your opinion answering the following questions:

"1. Is a new industry which proposes to operate a creamery, including the buying, pasteurizing, bottling, and selling of milk, the processing and selling of cream and butter, the manufacture and sale of ice cream, and the bottling and selling of buttermilk, chocolate milk and other milk drinks, but not the manufacture of condensed or evaporated milk or cheese, eligible for exemptions from city taxation in accordance with the provisions of Section 3, Title 51 of the Code of 1940? (This industry is not located within five

miles of a rehabilitation colony sponsored by the Federal Government.)

"2. Is a new industry which proposes to operate a carbonated beverage plant for the bottling of soft carbonated drinks eligible for exemptions from city taxation in accordance with the provisions of Section 3, Title 51 of the Code of 1940?

"3. Does the clause 'or any other manufactured products' operate to include either or both of the industries described in the two preceding questions and to what extent is this general clause applicable to industries other than those specifically described in the section?

"In addition to submitting with this request said certified copy of the resolution of the City Council, I hereby certify that advice on the above questions is necessary to the present performance of official acts of the City Council and that these acts must be immediately performed by the Council."

In answer to your first inquiry, I am of the opinion that a creamery as described in your request is qualified for the tax exemption as provided for by Title 51, Section 3, Code of Alabama 1940. The pertinent provisions of Title 51, Section 3, supra, read as follows:

"§3. Exemption of certain factories, industries and plants.—For the purpose of encouraging the building, extending, and operation of factories for the spinning of thread and yarns, * * * * * and factories for the manufacture of bags, wood pulp products, glass factories, ceremic factories, enameling factories and silica processing industries, paper, paper bags and other pulp products, wooden cabinets, and farm implements or mining of gold and graphite, **or any other manufactured products,** and plants or factories for making and manufacturing condensed and evarporated milk, or either, and other milk products and plants or factories for making and manufacturing cheese and other mlik products, and creameries and milk cooling stations, * * * * * the constituted authorities of any city or town in which it is proposed to locate, or add to, or to extend any such factories or plants, are authorized and empowered to remit the taxes assessed for all county and municipal purposes, * * * *." (Emphasis supplied.)

It is my considered opinion that the above provision expressly exempts creameries, as such, and that the provision in regard to milk products, etc., should be construed to grant the following exemptions:

1. An exemption to plants or factories for making or manufacturing condensed or evarporated milk and other milk products.

2. Plants or factories for making and manufacturing cheese and other milk products.

3. Creameries.

4. Milk cooling stations.

Therefore, I am of the opinion that your first inquiry must be answered in the affirmative.

In answer to your second inquiry, I am of the opinion that a plant for the bottling of soft carbonated drinks is not qualified for the exemption as provided for by Title 51, Section 3, supra.

As the courts have many times held that exemptions are strictly construed against the taxpayer, it is my conclusion that a bottling plant is not qualified for the said exemption, since a bottling plant, as such, was not so enumerated or described by the express language of the exemption section.

In deciding this question, I am not unmindful of the contention that is often made that the expression "or any other manufactured product," as used in Section 3 quoted above extends exemptions to classes of factories other than those specifically designated. I invite your attention to the following excerpt from an opinion of this office reported at Quarterly Report of Attorney General, Vol. 51, page 225:

> "The doctrine of 'ejusdem generis' requires that where particular classes of things are followed by general words, the general words are presumed to describe the particular classes previously enumerated. If the legislature had intended the general expression 'or any other manufactured products' to include products of the classes not enumerated previously, it would have been unnecessary and uncalled for to have enumerated the various particlar types of factories that are set forth. **Central of Georgia v. State,** 40 So. 991, 145 Ala. 99; **Johnson v. State,** 32 Ala. 583; **Prim v. State,** 36 Ala. 244. Therefore, the expression 'or any other manufactured products' means any other manufactured products of the kinds and nature previously enumerated in Section 3."

In view of the above, I am of the considered opinion that your second inquiry must be answered in the negative.

This opinion overrules the informal opinion rendered you by Mr. H. Grady Tiller in his letter to you of December 24, 1947.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 13, 1949.

Hon. Chas. W. Thompson,
Superintendent of Education,
Coosa County,
Rockford, Alabama.

Coosa County—County Superintendent of Education—Schools.

1. The County Board of Education of Coosa County has no authority to fix the salary of the Superintendent of Education for the four year period beginning July 1, 1949, and ending June 30, 1953. Such salary has been fixed by the legislature in the amount of $3600 per year under the provisions of Act No. 565, Local Acts 1947, page 377.

2. The County Board of Education of Coosa County under the authority of Title 52, Section 111, Code of Alabama 1940, as amended by Act No. 313, General Acts 1943, page 300, may fix, approve and authorize the payment of travel expenses for the Superintendent of Education not in excess of $600 per annum.

3. The County Board of Education of Coosa County should fix the travel expenses for the Superintendent of Education prior to the beginning of the next term of office which begins on July 1, 1949.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1949, is as follows:

"I have been elected Superintendent of Education of Coosa County for the four-year period from July 1, 1949 to June 30, 1953, inclusive.

"For the four-year elected term of July 1, 1945, to June 30, 1949, the said Board of Education set my salary at $250.00 per calendar month, or at a salary of $3000.00 per annum. The travel was set at $50.00 per calendar month, or $600.00 per annum. For each of the years of the four-year period of July 1, 1945 to June 30, 1949, I have, or will have received, the total amount of $3600.00.

"Under the following description: No. 565—An Act—H. 989—McDonald, amended Section 4, No. 23—An Act—H. 140—McDonald, Local Acts of Alabama 1943, Page 14, to read: 'The County Superintendent of Education (Coosa County) shall devote his entire time to the discharge of his duties as superintendent of education and shall

receive as compensation three thousand six hundred dollars ($3,600.00) per annum, payable at the time and in the manner prescribed by the general laws of the State for the payment of salareis of superintendent of education.' The amendment to said Local Act of 1943 was approved October 8, 1947.

"Inquiry Number One: Section 4 as amended—Does the Coosa County Board of Education have the necessary authority to set and pay my salary for the four-year period of July 1, 1949 to June 30, 1953 in the amount of $300.00 per calendar month, or in the amount of $3600.00 per annum as salaried compensation?

"Number 313, Page 301, of an Act, H. 271—Wood, approved by the General Session of the legislature of 1943, and was approved on June 28, 1943, and Section 111 states in part: 'The Boards of Education in Counties where the maximum salary of the Superintendent of Education is prescribed by law are hereby empowered to fix, approve, and authorize the payment of travel expenses of $600.00 annually incurred by the Superintendent in the performance of his official duties in and without the County.'

"Inquiry Number Two: Does the Coosa County Board of Education have the necessary authority to set the amount of my travel expenses at $600.00 per annum for each of the four-years from July 1, 1949 to June 30, 1953, and this amount ($600.00 per annum) to be in addition to the salary pay of $3600.00 per annum? In other words, does the said Board possess the necessary authority to pay me a salary of $300.00 for each calendar month, and a travel check of $50.00 for each calendar month, making a total of $350.00 per month, for each of the months in the four-year period of July 1, 1949 to June 30, 1953?

"Inquiry Number Three: When should the Coosa County Board of Education set the salary and travel pay for the four-year term of July 1, 1949 to June 30, 1953?

"Your opinion, at your convenience, regarding these three inquiries will be greatly appreciated."

In answer to your first inquiry, you are advised that the County Board of Education of Coosa County has no authority to fix your salary for the four-year period beginning July 1, 1949, and ending July 30, 1953, in any amount.

Act No. 565, Local Acts 1947, page 377, which act amends Section 4 of Act No. 23, Local Acts 1943, page 14, reads as follows:

"Section 1. Section 4 of Act No. 23, Local Acts, 1943, page 14, is amended to read: 'The County Superintendent of Education shall devote his entire time to the discharge of his duties as Superintendent of Education and shall receive as compensation three thousand

six hundred dollars ($3,600.00) per annum, payable at the time and in the manner provided by the general laws of the State for the payment of salaries of superintendents of education.'

"Section 2. This Act shall become effective upon its passage and approval by the Governor, or upon its otherwise becoming a law, but it shall not become operative until the expiration of the term of office of the present County Superintendent of Education for Coosa County."

It is to be specifically noted from the above-quoted act that the County Board of Education has no authority to fix your salary. This salary has been fixed by the legislature in the definite amount of thirty-six hundred dollars per annum. It is to be noted in the above act that this salary is to be payable at the time and in the manner provided by the general laws of the Satte for the payment of salaries of superintendents of education.

Title 52, Section 111, Code of Alabama 1940, as amended by Act No. 313, General Acts 1943, page 300, provides that in those counties in which the maximum salaries of county superintendents of education is not fixed by law the county superintendent of education shall receive such compensation including salary and travel expenses as the county board of education shall direct. This statute is silent as to the time and manner of payment of salary for those county superintendents of education who are paid under the general law.

You are, therefore, advised that in specific answer to your question number one, the County Board of Education of Coosa County may determine in its discretion to pay your salary in an amount of three hundred dollars per month or in an amount of thirty-six hundred dollars per annum. This for the reason that there is no time and manner prescribed by the general laws of this State for the time and manner of payment of salaries of superintendents of education.

In answer to your second question, you are advised that the County Board of Education of Coosa County may in its discretion fix, approve and authorize the payment of travel expenses for you in an amount not exceeding six hundred dollars per annum over and above your salary of thirty-six hundred dollars as set forth by Act No. 565, supra.

Title 52, Section 111, Code of Alabama 1940, as amended by Act No. 313, supra, specifically provides that in those counties where the maximum salary of the superintendent of education is prescribed by law the county board is authorized to fix, approve and pay the traveling expenses of the county superintendent of education in an amount not exceeding six hundred dollars per annum. In my judgment, this provision of Section 111 is not mandatory, and the county board of education of your county may if it sees fit allow you fifty dollars per calendar month for traveling expenses incurred by you over and above the compensation of your office fixed by the legislature.

In answer to your third inquiry, you are advised that, as pointed out hereinabove, it is not necessary for the County Board of Education of your county to set your salary, as this salary is fixed by Act No. 565, supra. In the event, however, the County Board of Education in its discretion allows you any amount for traveling expenses under the provisions of Section 111, as amended, then this travel expense should be fixed prior to July 1, 1949, the beginning of your term of office of superintendent of education, and by so doing any question of raising your compensation during your term of office will be eliminated.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 20, 1949.

Hon. H. M. Touart,
Tax Assessor,
Mobile County,
Mobile, Alabama.

Taxation—Ad Valorem Taxes—Exemption.

Under the facts stated, property owned by the Grace Lutheran Church in the City of Mobile, Alabama, is used exclusively for religious purposes and is exempt from ad valorem taxation.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1949, is as follows:

"On October 1, 1948, the following described land in the City of Mobile was owned by the Grace Lutheran Church:

Lot N side Government St., comg 45-2/12 ft. E of Espejo St., and runs E 232-4/12 ft. and extending thru to Conti St., with a front of 232-1/2 ft.

"This property was acquired by the Grace Lutheran Church quite some time prior to the above date for the specific purpose of building a place of worship thereon. However, due to shortages of labor and materials, and to other related factors, they had not been able to conclude arrangements for the actual beginning of work on the church building, and are just now in the process of letting a contract, so that construction will not begin for another few months.

"Since the purchase of the above land by the Grace Lutheran Church, it has been used solely for the purpose of storing brick, stone and other materials to be used in the construction of the church edifice; and for lawn parties and Easter egg hunts in connection with the activities of the Church. They have derived no revenue whatever from the land, and as a matter of fact have refused several offers to rent the same to commercial enterprises, not wanting to impart in any way a commercial character to the property.

"Under the above circumstances, I should appreciate your advising me if the above property of the Grace Lutheran Church is exempt from ad valorem taxation for the 1949 tax year."

In answering your inquiry, October first is ordinarily the law date of liability for ad valorem taxes. Quarterly Report of Attorney General, Volume 49, page 133.

Our Supreme Court, in construing the provisions of the Constitution and statutes exempting from taxation property used exclusively for religious purposes, held that the use of the property and not the ownership was the criterion in determining the exemption. **State et al v. Church of Advent**, 208 Ala. 632, 95 So. 3.

In the case of **State Tax Comm. v. Commercial Realty Co.**, 236 Ala. 358, 182 So. 31, our Supreme Court said:

"To enjoy the right of exemption under the provisions of § 91 of the Constitution, or § 2 of the General Revenue Law of 1935, Acts 1935, p. 257, the property must be irrevocably dedicated by the owner to exclusive charitable uses on the beginning of the tax year, when the obligation of the taxpayer arises, and such use must continue for and during the tax year. State v. Alabama Educational Foundation, 231 Ala. 11, 163 So. 527; Anniston City Land Co. v. State, 160 Ala. 253, 48 So. 659; Id., Second Appeal, 185 Ala. 482, 64 So. 110."

To answer your question, it is necessary to determine the use of this property on October 1, 1948 and during the tax year from October 1, 1948 through September 30, 1949.

From your facts, it is my opinion that this property was irrevocably dedicated by the owner to be used exclusively for religious purposes on the beginning of the tax year, that is, October 1, 1948, and has been so used up until the date of your request, June 15, 1949. In my opinion, it is reasonable to assume that said use will continue during the remaining months of the 1949 tax year, as you state that the owners are now in the process of letting a contract for the church building.

The premises considered, it is, therefore, my opinion that the property is owned and used by the Grace Lutheran Church exclusively

for religious purposes and is exempt from ad valorem taxation for the 1949 tax year, which taxes are due and payable on October 1, 1949.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 24, 1949.

Hon. T. J. Land, Chairman,
Walker County Board of Revenue,
Jasper, Alabama.

Hospitals—Walker County.

1. There is no authority contained in Act No. 436, Local Acts 1945, page 186, enabling the Walker County Board of Revenue to appropriate $1,000.00 per month for the care and treatment of indigent patients.

2. There is general statutory authority for county appropriation for hospitals and for treatment of the indigent sick and wounded. (Title 22, Sections 189-190, Code of Alabama 1940)

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of June 4, 1949, is as follows:

"As chairman of the Walker County Board of Revenue, I respectfully request your official opinion as to whether or not the Walker County Board of Revenue can appropriate out of the General Funds of Walker County the sum of one thousand dollars ($1000.00) per month for the care of Indigent Patients at said hospital for period of time extending from July 6, 1945 up to the present date.

"Local Act No. 436 passed by the legislature and approved by the Governor on July 6, 1945, found in Local Acts at page 186, provided that the Walker County Board of Revenue was to appropriate out of the General Fund of said County the sum of one thousand dollars ($1000.00) per month for the care and treatment of Indigent Patients of said County. Since the passage of that Act, only the sum of four thousand dollars ($4000.00) has been appropriated for the entire period. The Walker County Board of Revenue maintains and operates the Peoples Hospital in Jasper, Alabama. Since September 30, 1945, services rendered by the Peoples Hospital for Indigent Patients has amounted to seventy nine thousand six hun-

dred sixty eight dollars (79,668.00), as stated four thousand dollars has been appropriated over the entire period of years for Indigent Patients. The number of Indigent Patients is increasing and the Peoples Hospital can not operate without appropriations from the General Funds of the County. I desire to know if there is any limitation placed upon the Board in appropriating money covering the back period of time no money was appropriated for Indigent Patients. The Peoples Hospital owes at the present time the sum of fifteen thousand dollars ($15,000.00) and most of this money was spent for the care of Indigent Patients.

"I feel that under the Local Act the Board of Revenue probably has authority to appropriate the one thousand dollars per month as stated in the Act, but I am particularly interested in knowing whether the Board can appropriate money to cover expense incurred for Indigent Patients since the passage of the Act in 1945.

"There is, attached to this letter, a statement showing services rendered to Indigent Patients since 1945, the amount which has been appropriated by the Board of Revenue and the amount authorized under the Act. This is being sent for your information."

I am unable to find any authority in Act No. 436, Local Acts 1945, page 186, approved July 6, 1945, for the expenditure by the County Board of Revenue of $1,000.00 per month for the care of indigent patients. This act, which repealed Act No. 105, Local Acts 1937, page 56, approved February 23, 1937, did not re-enact the authority to expend a thousand dollars per month from the county general fund for the care and treatment of indigent patients of the county, which authority was contained in the 1937 Act. Therefore, the answer to your question as to how much the Walker County Board of Revenue may appropriate for the Peoples Hospital in Jasper is not contained in the 1945 Act. For under the 1945 Act, there is no authority to spend any money at all for the care and treatment of patients.

There is, however, general authority for county expenditures from county general funds for hospitals and for treatment of the indigent sick and wounded. Title 22, Section 189, Code of Alabama 1940, allows the County Governing Body to establish hospitals within the county. Title 22, Section 190, Code of Alabama 1940, provides:

"The Governing Body of any county or city in this State may make an appropriation or appropriations out of their respective treasuries to aid in maintaining and taking care of sick and wounded persons who are unable to provide for themselves in any hospital maintained for the care of sick and wounded . . . ."

Title 12, Section 185, Code of Alabama 1940, allows the Board of Revenue of a given county to erect a hospital as a necessary county building.

In **Laney v. Jefferson County**, 249 Ala. 612, 32 So. 2d 542, the court stated that counties had statutory authority to provide for the charitable hospitalization for those who were unable to provide hospitalization for themselves. The court also stated that the county could make appropriations for these purposes. See also: **Board of Revenue of Etowah County v. Hutchins**, 250 Ala. 173, 33 So. 2d 737.

It is clear that there is general statutory authority enabling the counties to appropriate money out of their treasuries for hospitalization purposes. It is equally clear that there is no such authority in the Local Act (Act No. 436, Local Acts 1945, supra) upon which you rely.

Your request states that the Walker County Board of Revenue maintains and operates the Peoples Hospital. But your request is unclear as to the source of the money used by the county to operate this hospital. If the hospital needs more funds, there appears to be ample statutory authority for increasing the appropriation for the hospital. This appropriation would come from the county treasury, under the provisions of Title 22, Section 190, supra. It is impossible, however, to rely on the Local Act in question.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

June 24, 1949.

Hon. J. G. Kimbrough,
Judge of Probate,
Washington County,
Chatom, Alabama.

Taxation—Deed Filing Tax.

Deed filing tax payable upon instrument evincing a conveyance of all the property of a corporation to the shareholders of that corporation, in consideration of the surrender by the shareholders to the ocrporation of their stock, when such instrument is received for record.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of April 18, 1949, is as follows:

"At a board of directors meeting of McClure Pine Company, a corporation, motion was passed directing the officers of the corporation, together with the directors or trustees, to convey all of the property, belonging to said corporation, to the various stock-

holders according to their respective interests; and in consideration of the cancellation and surrender of 1,000 shares of Capital Stock, being all the stock authorized and outstanding—an instrument conveying to each stockholder his or her proportionate number of the 1,000 shares in and to land described in Washington County, Alabama in the approximate number of 8984 acres. Also, all oil, gas and mineral rights heretofore reserved by McClure Pine Company and described and containing 1153 acres, more or less. This instrument dated June 12, 1946.

"Please give me an official opinion as to whether or not this instrument is taxable under Deed Filing Tax."

The instrument to which you refer in your request is taxable when received for record under the provisions of Title 51, Section 618, Code of Alabama 1940.

It appears from your request that the Directors and Officers of the McClure Pine Company conveyed all of the property of that corporation, including land and oil, gas and mineral rights, to the shareholders of said corporation in consideration of the surrender of one thousand shares of the capital stock in said corporation. This transaction constitutes a conveyance of property or interest therein from one legal entity to another legal entity. The conveyance, therefore, falls within the provisions of Section 618, supra. It is not within the exception for "deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate . . . ." See: **Hawkins v. Pure Oil Company**, 232 Ala. 660, 169 So. 307; Quarterly Report of Attorney General, vol. 18, page 150; Cf. Quarterly Report of Attorney General, vol. 20, page 206.

The **Hawkins** case, supra, controls the instant situation. In that case Corporation A acquired all the capital stock in Corporation B. Corporation B was then dissolved, and Corporation A thereby became the owner of all the assets of Corporation B. A Writ of Mandamus was issued to compel the Probate Judge to record a deed, evincing the transfer of these assets to Corporation A, free of a deed filing tax. The Alabama Supreme Court reversed the judgment of the lower court and held that a deed filing tax was due upon the recording of such instrument. The court further held that the deed was not a deed for nominal consideration for the purpose of perfecting title. The court stated:

". . . . this is not a deed for perfection of title within the meaning of the exception. It is to preserve the evidence of the title and to place in record form the title already acquired. To such a deed the general rule, and not the exception in the statute, applies."

The court continued:

"And the very deed tendered for record, and made an exhibit to the petition, discloses on its face that it was executed by the

parties named as directors and as liquidating trustees of the Wofford Oil Company (Corporation B), thus indicating the continued existence of the corporation for such limited purposes as contained in our own statute."

The instant case is even stronger than the **Hawkins** case, supra, in that there is no indication from your request that the McClure Company had undergone formal dissolution. Therefore, as stated above, the conveyance of property was from one legal entity, the corporation, to other legal entities, the shareholders. The opinion in Quarterly Report of Attorney General, Vol. 18, page 150 states:

> "The consideration recited for the conveyance, to wit, surrender by the grantee to the grantor of all of the capital stock of the grantor corporation theretofore held by the grantee corporation is in no sense 'a nominal consideration for the purpose of perfecting the title to real estate.' The legal effect of the conveyance is not to perfect title, but, in fact, to transfer a legal title from one legal entity to another."

The facts of the opinion in Vol. 18 show that the grantee corporation held all the capital stock of the grantor corporation, and the conveyance was in consideration of the surrender of the stock by the grantee to the grantor. Cf. Vol. 20, page 206, where a merger was involved, and where a deed filing tax was nevertheless due.

To reiterate, a deed filing tax is payable on the instant instrument offered for record.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 24, 1949.

Mrs. Lake T. Tate, Chairman,
Board of Registrars,
Lauderdale County,
Florence, Alabama.

Board of Registrars—Lauderdale County.

Board of Registrars of Lauderdale County not entitled to compensation for an illegal session held under mistake of law.

Opinion by Assistant Attorney General Parker.

Dear Madam:

Your request for an official opinion, bearing date of March 7, 1949, is as follows:

"Recently your office released through the papers a schedule of legal meeting dates for Boards of Registrars in the 67 Counties of Alabama and same appeared in said papers. The Code of Alabama also fixes said dates. One of these dates is as follows: 'Beginning second Monday in February each odd-numbered year for as long as one week, hearing objections to names proposed to be stricken from registration lists.'

"During February the Board of Lauderdale County, Alabama, met the regular two meeting days as scheduled and on the second Monday in February, 1949, same being the odd year named in the schedule, met for one week, six days, for the purposes therein set out.

"At the conclusion of the work, on, towit, February 21, 1949, statements for the three Registrars, W. E. Briggs, Mrs. Lake E. Tate and Mrs. Alma B. Young, were duly filed and certified by the Probate Judge of this County, and forwarded to John Graves, State Comptroller for payment, in the sum of $60.00 for each Registrar, covering the 2 regular days and six extra days during February as specified above.

"Mr. Graves returned the statements without paying same with the following notation:

"'Under the law the Board of Registrars meet only two days in February, 1949, first and third Mondays.'

"Will you kindly render us opinion immediately as to the legality of our claim for payment and such other information as you find needful?"

Your attention is called to an opinion of this office rendered to Hon. John Brandon, Secretary of State, Montgomery, Alabama, under date of June 20, 1941, which now appears in Quarterly Report of Attorney General, Vol. 23, page 235. In that opinion, speaking of Title 47, Section 17, Code of Alabama 1940, it was said:

"The premises considered, I am of the opinion that the evident intention is different from the literal import of the language used and that such intention should prevail; that the phrase 'the second Monday in February, 1941' as it appears in Section 47, Title 17, Code of 1940, should be properly construed as 'the second Monday in February, 1940,' thereby bringing it into conformity with Section 46 and giving it some rational purpose and meaning. Reynolds v. Fabritis, 233 Ala. 625, 172 So. 889; Tuscaloosa County v. Shamblin, 233 Ala. 6, 169 So. 234; 59 Corpus Juris, 991.

"Any other construction would throw the registration statutes in this particular into inextricable confusion."

This office has recently reviewed this opinion and reaffirmed its holding in Quarterly Report of Attorney General, Vol. 50, page 96. Therefore, your meetings were not authorized in this year.

I know of no authority of law authorizing pay to registrars for services rendered under mistake of law. In my opinion, the fact that your board met and worked under the mistaken idea that you were complying with the requirements of the law cannot authorize pay for your services. However, you are entitled to payment for your services for the two-day regular session, but not for the six-day special session.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 24, 1949.

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Franklin County—Local Legislation.

1. Under the provisions of Act No. 8, H. 51, approved May 24, 1949, it is mandatory that the county governing body of Franklin County, between the first and fifteenth day of each month, publish an itemized statement of all expenditures for road and bridge purposes.

2. The cost of publication of said itemized statement shall be paid out of the general fund of the county.

3. The effective date of said Act is May 24, 1949.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of May 31, 1949, is as follows:

"I enclose herewith a copy of a Local Act of the Legislature designated as No. 8 H. 51—Haynes (of Franklin), approved May 24, 1949.

"If you believe this Act mandatory, requiring the Court of County Revenue of this county to have made the publication of the information mentioned in this Act, please advise me whether or not the expense to be incurred in executing the Act may be paid

from the Gas Tax Fund of the county, being the receipts of monies from the state on account of the gasoline excise tax.

"In the event the expense cannot be borne by the Gas Tax Fund of the county, please advise whether or not such expense may be paid from the Road, Bridge and Public Buildings Fund, derived from a levy of 2½ mills tax in accordance with Section 215 of the Constitution and Section 186 of Title 12 of the Code.

"We anticipate that the execution of this Act will put the county to considerable expense, necessitating the employment of an additional clerk to keep additional records and prepare the report for the newspaper, plus the printing expense, which we have been unable to estimate yet, and our General Fund for the fiscal year has all been budgeted and there will be no available money from it.

"Also please advise the effective date of said Act."

In answer to your request, you are advised that in my opinion the provisions of Act No. 8, H. 51, approved May 24, 1949, are mandatory. It is to be noted that the very wording of the act is, "the county governing body shall publish" in some newspaper of county-wide circulation an itemized statement of all expenditures made by it for road and bridge purposes during the preceding month. It is commonly understood that when the word "shall" is used in an act, then the terms of the act become mandatory.

It is not necessary in answering your request to consider what expenditures may be charged against the County Gasoline Tax Fund, or the Road and Bridge Fund of your county. This for the reason that the act itself provides that "the cost of publication shall be paid by the county."

The Supreme Court in the case of **Weaver vs. Tidwell**, 228 Ala. 169, 153 So. 218, held that where a statute made a certain claim a charge against the county treasury, then the commissioners court of said county was without authority to make such claim a charge against the county's share of the Gasoline Tax Fund. You have a similar situation existing in Act No. 8, supra. It is definitely provided that the cost of publication required by this act shall be paid by the county. This, in my opinion, means from the general fund of the county.

You are, therefore, advised that, due to the express terms of Act No. 8, supra, the cost of publication therein required and any other cost of administering said act may not be paid from the county Gasoline Tax Fund, nor may it be paid from the county Road, Bridge and Public Buildings Fund.

You asked to be advised as to the effective date of this act. Unless it is otherwise expressly provided in an act, such act goes into effect

upon the approval by the Governor. The effective date not being otherwise provided in Act No. 8, supra, you are advised that it became effectve on May 24, 1949, the day it was approved by the Governor. Ala. Digest Statutes Key 255.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 26, 1949.

Hon. J. J. Collins,
Superintendent of Education,
Geneva County,
Geneva, Alabama.

Schools—Funds—Insurance—County Boards of Education.

1. A course in the operation of a motor vehicle is a proper and legitimate field of study in the public schools.

2. Expenses incident to maintaining an automobile used by a public school in a course of instruction in driving may be paid from public school funds.

3. A county board of education, not being liable in tort for the negligent act of its servant or agent, may not spend public school funds for liability insurance when students and instructors operate motor vehicles in a course of instruction.

4. Although legal title to an automobile used by public schools is in a private individual, the county board of education may expend public school funds for collision insurance.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 26, 1949, is as follows:

"The County Board of Education has been requested to pay expenditures in regard to instructional purposes on driving and safety regulations being given in the schools and I would appreciate an opinion from you within the next few days in regard to the legality of this expenditure.

"(a) Could the local school expend funds for gasoline, oil, etc., for this car while it is being used for instructional purpose.

"(b) Would the County Board of Education be permitted to legally expend funds from their general fund for gas, oil, etc., while it is being used by the school for instructional purpose.

"(c) Would the County Board of Education be permitted to legally expend funds from their general fund for insurance on their car. As I understand this would cover liability and collision.

"The car to be used for this instruction is being furnished by an individual and would be a private owned car but furnished free to the school if the above expenditures are taken care of by the local school or by the County Board of Education."

In my opinion, the local school or the county board of education may legally expend public school funds from their general fund in order to purchase gasoline and oil for the automobile described in your inquiry. Such funds may also be expended for the purpose of paying the premium on collision insurance but not liability insurance.

I am informed that several of the high schools in this State conduct a course in which students are instructed in the proper method of opearting a motor vehicle. The purpose of such course is not only to teach the students to operate a motor vehicle properly, but to acquaint the student with the various safety regulations and laws governing the operation of motor vehicles. It is my opinion that this type of instruction is a legitimate course of study and is not only beneficial to the student but to the community as well. It follows that the expenses for conducting such course of study may be paid for in the same manner as the expenses for any other course of study, that is to say, from public school funds. Since gasoline, oil and other maintenance costs are necessary expenses in this course, it is my opinion that public school funds may be so expended without violating the provisions of our Constitution, which require public school funds to be spent for the "support and maintenance of the public schools." See Constitution of Alabama 1901, Sections 258-260; also Title 52, Section 199, Code of Alabama 1940.

Public school funds, however, may not be spent to pay the premium on liability insurance, for the reason that the county board of education cannot be liable in tort for the negligent act of its servant or agent. **Hawkins vs. State Board of Adjustment**, 242 Ala. 547, 7 So. 2d 775; **Turk vs. Board of Education**, 222 Ala. 177, 131 So. 436; Quarterly Report of Attorney General, Vol. 31, page 82.

Since the county board of education could not be liable in tort for the negligent act of its agent or servant operating such vehicle, it is my opinion that money spent for premiums on liability insurance would be unnecessary and unauthorized. Of course, if the teacher instructor or student desires to take out liability insurance, that is a private matter, as the individual teacher or individual student may, of course, incur liability for negligent injury to others.

It is further my opinion that the county board of education may spend public school funds for collision insurance. By this I mean that the county board of education may insure itself for damage to the automobile used by the school.

It is stated in your inquiry that the use of the automobile is donated by a private individual, and, of course, the legal title is not in the county board of education or in the local school. On the other hand, the use of the automobile is in the county board of education or the local school, and it is my opinion that the county board of education may accept the beneficial use of the property. See Title 52, Section 71, Code of Alabama 1940. Even though the legal title to the automobile is in the private individual, the county board of education would have an interest in having the automobile repaired and placed in a serviceable condition in the event the automobile was damaged. For that reason, therefore, premiums on collision insurance would be a proper charge against public school funds. See Biennial Report of Attorney General, 1926-28, page 609.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

June 30, 1949.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Maps—Records—Surveys.

The Probate Judge may accept for record a map which is not accompanied by a surveyor's certificate.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of May 26, 1949, is as follows:

"A map has been presented to me for recording and according to Title 56, Section 13, of the Code of Alabama for 1940, I am not sure whether I can accept it, and would like to have you give me a ruling on it. According to this Title and Section a Plat must be certified, signed by the owner and acknowledged. This is an old map that was dug up by the Etowah Abstract Company. It evidently had been presented to the Probate Judge for recording but no record was made of it. It is a very large map and to get it in any plat book the County has ever had it would have had to be

reduced in size very greatly. That might account for its not being recorded. According to the Probate Judge's Certificate it may have been filed in the Plat Book but not recorded. If that is the case, it was never indexed and there is no record whatever of it in any Plat Book, and the map itself was missing. I am enclosing a photostatic copy of all the writing on the map. As you will see, it has a certificate by the owner and is properly acknowledged and has a filing stamp by the Probate Judge but does not have a certificate by the surveyor, since this is lacking, I would like to have the ruling on whether to accept it or not. This Title does not definitely say that it has to be on it, but it does imply as much. This does not come under the City Planning Commission of Gadsden, as the property is located in Attalla, and they do not have a Planning Board."

Your question is whether or not a probate judge may accept for record a map which is properly acknowledged and certified by the owner, but which is not accompanied by a certificate from the surveyor. You may accept such a map for record.

Title 56, Section 13, Code of Alabaam 1940, does not expressly prohibit the acceptance of such a map for record. The Section does provide:

> "The plat or map together with the certificate of the surveyor and of acknowledgment, shall be recorded in the office of the Judge of Probate in the county in which the lands are situated in a suitable book to be kept for that purpose; . . . ."

The Section does not say that a map shall not be recorded if no surveyor's certificate accompanied it. Section 13 should be compared with Title 56, Section 15, Code of Alabama 1940 which provides:

> "It shall be the duty of every probate judge in this state to decline to receive for record in his office any map or plat upon which any lands lying within the corporate limits or police jurisdiction of any city of this state having a population of more than 10,000 inhabitants are platted or mapped as streets, alleys or other public ways, unless such map or plat shall have noted thereon the approval of the governing body or city engineer of such city."

A careful examination of these two sections will show that where the Legislature intended to prohibit the recording of a map which was unaccompanied by the requisite certification and approval, the Legislature clearly stated this intent. We must infer, then, that the Legislature intended no mandatory prohibition in Section 13, supra, which does not contain the express prohibitive language of Section 15, supra.

There is no case authority in Alabama bearing directly on your situation. The case of **Pan-American Life Insurance Company v. Mayfield, 49 Fed. 2d 900; affirmed 49 Fed. 2d 906,** is in point, however. In the

Pan-American case, a South Carolina Statute made prior recordation in the office of the auditor a prerequisite to the recordation of a deed in the office of the Register. The Statute also provided that any recording of a deed in the Register's office, without such prior recordation in the auditor's office, should be illegal and, therefore, no notice to the plaintiff involved. The Court decided, however, that this statute was merely directory and not mandatory. But cf. **Leatherman v. Schwab, 98 Fla. 885, 124 So. 459.**

It is not the intention of this writer to express any opinion on the evidentiary value of the recordation of the map in question. This opinion is merely to the effect that you may accept for record a map which has been acknowledged and certified by the owner, but which is unaccompanied by a certificate of the surveyor.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

June 30, 1949.

Hon. Ward W. McFarland,
State Highway Director,
CAPITOL.

Highways and Highway Department—Bids—Bonds.

When, through error, bid bond accompanying a bid proposal for construction work for the State Highway Department as required by Act No. 492, General Acts 1947, page 338, is made payable to the United States of America rather than to the State of Alabama, such error may be waived by the State Highway Director under the provisions of Section 3.01 of the Standard Specifications for Road and Bridge Construction dated October 1, 1939, and when such technical error is corrected, the bid may be considered a bona fide bid.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 27, 1949, is as follows:

"Attached is a bid bond submitted by J. B. Maynard on projects S-261(1) and S-312(1), Macon County, for bids to be opened on June 24 ,1949.

"You will note that this bond is made payable to the United States of America rather than the State of Alabama.

"Section 15(3), of Title 50, of the Code of Alabama, as amended September 30, 1947, provides as follows:

" 'The bidder shall be required to file with his bid either: (1) a certified check payable to the awarding authority for an amount not less than five per cent of the awarding authority's estimated cost or of the contractor's bid, but in no event more than ten thousand dollars; or (2) a bid bond payable to the awarding authority in an amount not less than ten per cent of the bid or the awarding authority's estimated cost. Such bid guaranties as herein provided shall constitute all of the qualifications or guaranty to be required of contractors as prerequisites to bidding for public works, except as required by the State licensing board for general contractors and the prequalification as required by the highway department or the building commission.'

"In view of the fact that the State of Alabama is the awarding authority, can the bid of J. B. Maynard be considered as a bona fide bid?

"P. S. The bid submitted by this contractor was $40,055 and the bid of the next bidder was $41,778.80. The surety for J. B. Maynard has offered to submit a corrected bid bond to cover this work."

In answer to your inquiry, your attention is called to Section 3.01 of the Standard Specifications for Road and Bridge Construction dated October 1, 1939, in which it is provided that:

"* * * * Until the final award of the contract, however, the Director reserves the right to reject any and all proposals and to waive technical errors if, in the judgment of the Director, the best interest of the state will thereby be promoted."

The bid bond filed by the bidder under the provisions of Act No. 492, General Acts 1947, page 338 (Section 3 of which is set out in your inquiry), is part of the bid proposal. The fact that the bid bond was made payable to the United States of America rather than to the State of Alabama (the awarding authority) is, in my opinion, a technical error, and may be waived by the State Highway Director under the provisions of Section 3.01, supra. However, it is my conclusion that the waiver of such technical error is a matter within the discretion of the Director.

You state in your inquiry that the surety of the bidder has offered to submit a corrected bid bond. Such action on the part of the surety would, in effect, be nothing more than a correction of the error in the original bid bond.

It is my opinion that the Director, under the provisions of Section 3.01, supra, may permit the surety on the bond to correct the technical

error in the original bond, and that, if such technical error is corrected, the bid under consideration may be considered a bona fide bid.

Cf. Opinion to you under date of October 9, 1947, and found in Quarterly Report of Attorney General, Vol. 49, page 19.

The enclosure submitted with your request are returned herewith.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1949.

Hon. Solomon Baxter, Superintendent,
Board of Education,
Houston County,
Dothan, Alabama.

Superintendent of Education—Traveling Expenses.

In those counties that are within the purview of Act No. 139, approved February 24, 1937, Extra Session of the Legislature 1936-37, page 157, there is no limitation on the amount of traveling expenses which the Board of Education may allow the Superintendent of Education.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 20, 1949, is as follows:

"I would like for you, at your convenience, to give me an opinion on the following questions with reference to the payment of the expenses of the Houston County Superintendent of Education. The Houston County Board of Education is empowered by S. B. 139 and H. B. 343, by Calhoun, page 157, Extra Session 1936-37, to pay the expenses of the Superintendent incurred by him in the performance of his official duties within the State and without the State.

"**Query No. 1.** Does the act limit the amount of expenses that the Houston County Board of Education can pay its Superintendent?

"**Query No. 2.** Was the Houston County Board of Education within its authority when it authorized, at a regular meeting, that the mileage payment of the Superintendent be raised from five cents to six cents, effective as of January 1, 1948? The authorization for this raise in mileage came from a previous regular board meeting in December, 1947."

The main question presented by your inquiry is whether or not there is a conflict between Act No. 139, Extra Session of Alabama 1936-37, page 157, and Section 111 of Title 52, Code of Alabama 1940, as amended.

Section 111, supra, as amended, reads as follows:

"§ 111. Must devote entire time to office; salary, traveling expenses.—The county superintendent of education shall devote his entire time to public school business. In counties in which the maximum salary of the county superintendent of education is not fixed by law, the county superintendent of education shall receive such compensation, including salary and travel expenses, as the county board of education shall direct. In counties where superintendents of education are elected by a direct vote of the qualified electors, the salary for the office must be fixed prior to the beginning of the term of office. The boards of education in counties where the maximum salary of the superintendent of education is prescribed by law are hereby empowered to fix, approve, and authorize the payment of the traveling expenses not in excess of $600 annually incurred by the superintendent in the performance of his official duties within and without the county."

Section 1 of Act No. 139, supra, reads as follows:

"Section 1. The Boards of Education in all Counties in the State of Alabama with a population of not less than 45,300, nor more than 46,100, according to the last, or any subsequent Federal Census, where the maximum salary of the Superintendent of Education is prescribed by law are hereby authorized and empowered to fix, approve, and authorize the payment of the traveling expenses incurred by the Superintendent in the performance of his official duties within the County and the expenses incurred by him when his official duties require him to go outside of the county."

The question, therefore, to be determined is whether or not this general act prevails over Act No. 139, and is a limitation on the amount of traveling expenses which the county board of education may allow the superintendent of education under the provisions of Act No. 139, supra.

In my opinion this question should be answered in the negative.

Section 111, supra, is a general provision of law relating to a general subject, namely, the traveling expenses allowed the superintendent of education generally, while Act No. 139, supra, is a special provision of law relating to a specific subject, namely, the traveling expenses of those superintendents of education coming within its purview.

It is a well known principal of statutory construction that where there is a general provision of law dealing with a general subject, and a special provision of law dealing with a specific subject, the special provision will be construed as an exception to the general law, and,

therefore, controlling. To state this principle another way is, that if there is an apparent conflict between a general provision of law dealing with a general subject, and a special provision of law dealing with a specific subject, the general provision will yield to the special, and both will be given effect so as not to conflict. **Herring vs. Griffin**, 221 Ala. 225, 100 So. 202; **Dowling vs. City of Russellville**, 241 Ala. 497, 3 So. 2d 34; **State vs. Elliott**, 246 Ala. 439, 21 So. 2d 310.

I am of the opinion that this well known principle of statutory construction is applicable in the instant case. It, therefore, follows that the traveling expenses of the superintendents of education coming within the purview of Act No. 139, supra, are governed by that act, and Section 111, supra, is not a limitation on the amount which the county board of education may allow under the provisions of said Act No. 139, supra.

Specifically answering your inquiry No. 1, it is my opinion that Act No. 139, supra, does not limit the amount of expenses that the Houston County Board of Education can pay its superintendent under the provisions thereof.

Answering your inquiry No. 2, it is my opinion that the County Board of Education of Houston County was within its authority in fixing the traveling expenses of the superintendent of education at six cents per mile rather than five cents per mile. As a matter of fact, the county board of education has authority under the provisions of Act No. 139, supra, to fix the traveling expenses incurred by the superintendent of education of said county in any sum or amount which it sees fit.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1949.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Public Accounts,
CAPITOL.

Sheriffs—Fees.

1. In computing the net annual income of a sheriff under the provisions of Title 11, Section 34, Code of Alabama 1940, to determine whether or not he is entitled to the ex officio fee, not exceeding six hundred dollars per annum, authorized thereby, all "fees of office" should be included with no deduction made for ex officio fees paid such officer under any other provision of law.

2. In computing the net annual income of a sheriff under the provisions of Title 11, Section 34, supra, no deduction should

be made for any sums expended by such officer in the form of membership or other dues paid to any association of which he is a voluntary member nor for contributions made by such officer to any person, association, agency, or institution nor for any sum expended in payment of Federal income tax.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 21, 1949, is as follows:

"In arriving at the annual income of a sheriff, to determine whether or not he is entitled to the $600.00 ex-official fees authorized under Title 11, Section 34, Code of 1940; are the following items deductible from the gross earnings?

"1. Ex officio fees collected.

"2. Dues Sheriffs' Association.

"3. Contributions.

"4. Federal Income Tax."

In my opinion, each of your inquiries should be answered in the negative.

The statutory provision of law pertinent to your inquiry is to be found within Title 11, Section 34, Code of Alabama 1940, and is as follows:

"Impaneling grand juries, advertising and attending all elections, in his county, and for all other public services not otherwise provided for, such sums as may be just, to be allowed by the county commissioners court, upon representation of a verified account showing the items of service rendered, to be paid out of the county treasury, not exceeding six hundred dollars per annum; **provided that any sheriff whose annual income from fees of office exceeds five thousand dollars net, after all expenses have been paid by him, shall not have any ex-officio allowance, to be paid quarterly.**" (Emphasis supplied.)

Adverting to the emphasized portion of the above-quoted statute, it is apparent that the net annual income of the sheriff there referred to is that income derived from "fees of office" with no distinction there made between such fees, that is, whether they be ex officio fees or otherwise. It is, therefore, my judgment that in computing the net annual income of the officer here concerned, all "fees of office" should be included with no deduction made of any ex officio fees paid such officer under any other provision of law.

Considering next the latter three items mentioned by you in your request, it is my opinion that none of such three are properly deductible in computing the net annual income of the sheriff. Referring again to the emphasized portion of the above statute, it is to be observed that it is there provided that to entitle any sheriff to the fee therein provided for such sheriff's net annual income from fees of office must not exceed five thousand dollars, "after all expenses have been paid by him." It is my considered opinion that the "expenses" therein mentioned can only mean expenses of office, that is, those expenses incurred by the officer in performing the services by virtue of which the officer becomes entitled to those fees of office made the basis of computing his annual income.

The question therefore arises as to whether those items listed by you may properly be considered as expenses incurred by the sheriff in performing those services for which he earned the "fees of office" heretofore referred to. Considering such items in their respective order, it is my judgment that any membership or other dues paid by such officer to any association of which he is a voluntary member may not properly be deducted in computing his net annual income under the provisions of the statute here involved. This is true of the Sheriffs Association to which you refer, for the reason that a sheriff may elect as to whether or not he shall become a member thereof, and any membership or other dues paid by him to such association do not constitute an expense of his office and are, therefore, not properly deductible.

The same is true of any contributions made by such officer to any person, association, agency, or institution. Such an act would be purely voluntary upon his part and could not properly be charged as an expense of his office in the sense in which the term is here used.

Considering lastly your inquiry concerning the deduction of the Federal income tax paid by such officer, it is my judgment that such is not properly deductible. The provisions of the Federal income tax law are not peculiarly applicable to a sheriff nor to the income earned by such officer in the form of "fees of office." Rather, the provisions of such law are applicable to all alike and to all sources of income not exempted therefrom under the specific provisions of the law. In my judgment, the sum paid by the sheriff as Federal income tax cannot properly be said to be an expense incurred by him in performing the service whereby he became entitled to his "fees of office" and, hence, such item is not deductible in computing the net annual income of the sheriff under the provisions of Title 11, Section 34, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 30, 1949.

Hon. J. F. Hodges,
County Superintendent,
Jackson County,
Scottsboro, Alabama.

Schools—County Board of Education—Tort Liability.

1. A county board of education cannot be sued on a claim arising from the negligence of one of its servants or agents because it is an independent agency of the State acting in a governmental capacity.

2. Any person injured as a result of the negligent acts of an agent or servant of the county board of education may seek relief through the State Board of Adjustment, created and governed by Title 55, Sections 333-344, Code of Alabama 1940, as amended.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of December 13, 1948, is as follows:

"One of the school buses owned by the Jackson County Board of Education collided with a passenger car on the Pisgah Highway at a crossroads in this county. The school truck was slightly damaged but the passenger car was damaged extensively.

"It is my understanding that the Highway Patrolman states that it was as much fault of one as the other of these two drivers.

"I would like to know if the Jackson County Board of Education can be held responsible for damages to this car. I understand that your Division has made several rulings in the matter of wrecks with County owned school trucks. If you have opinions that have already been rendered that will clarify them, I would like to have a copy of them or a ruling directly on this case."

It is my opinion that your inquiry should be answered in the negative.

It has been held by numerous decisions of the Supreme Court of the State that a county board of education cannot be sued on a claim arising from the negligence of one of its servants or agents because it is an independent agency of the State acting in a governmental capacity. Such holding is found expressed as follows in the case of **Hawkins v. State Board of Adjustment, et al.**, 242 Ala. 547, 7 So. 2d 775.

"This Court has held that a county board of education could sue and be sued to a limited extent, but not on a claim arising from the negligence of one of its servants or agents because it is an independent agency of the State, not one which is immediate, but nevertheless it is acting in a governmental capacity. Turk v. Board of Education, 222 Ala. 177, 131 So. 436; Ex parte Board of School Com'rs of Mobile County, 230 Ala. 304, 161 So. 108. Those cases, following Shepherd v. Jones, 228 Ala. 307, 153 So. 223, make a separate classification of strictly State boards and commissions, including State colleges and describe them as immediate and strictly governmental agencies, not subject to suit. But that a county board of education, while not an immediate agency of the State, acts in a public and governmental capacity, and therefore is not liable for the torts of its agents and employees, while so engaged, but is ordinarily otherwise subject to suit. . . ."

See also **State v. Brandon**, 244 Ala. 62, 12 So. 2d 319; Quarterly Report of Attorney General, Volume 48, page 260.

In view of the above, it is apparent that the county board of education can in no way be held liable at law for any damages incurred as a result of such accident, nor is such board liable for suit for same for the reasons above pointed out.

However, I should call to your attention the fact that it is the further holding of the **Hawkins Case**, supra, that although the county board of education may not be sued on a claim arising from the negligent acts of one of its servants or agents, one so injured as a result of such negligent acts or conduct upon the part of any such agent or servant may seek relief through the State Board of Adjustment, an agency established by the Legislature for just such a purpose. The powers, authority and jurisdiction of such Board are found set out within Title 55, Sections 333-344, Code of Alabama 1940, as amended, and should it be that as a result of the negligent acts of an agent or servant of the county board of education a third party suffers injury, such person's proper recourse lies with the State Board of Adjustment rather than with the county board of education.

Yours very truly,

A. A. CARMICHAEL

Attorney General.

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